

Revoked NWP

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 21 (Surface Coal Mining Activities)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 21, and addresses the revocation of this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from all areas within the Honolulu District.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

No general comments were received in response to our public notice.

3.0 Discussion of applicability of NWP 21 in the Pacific Ocean Division's Honolulu District

The vast area which makes up the Honolulu District (POH) area of responsibility (AOR) is comprised of a series of geographically isolated archipelagos, remnants of volcanic activity. Since the islands have evolved from volcanoes, they are not geologically capable of producing coal, whether at the surface or deep underground. Coal is not a resource which is present and, therefore, will never be mined in any water of the U.S. within the POH AOR.

13.0 Final Determination

Based on the considerations discussed above, and in accordance with 33 CFR 330.4(e)(1) and 330.5(c), I have determined that NWP 21 shall be revoked from use within the Honolulu District.

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 24
(Indian Tribe or State Administered Section 404 Programs)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 24, and addresses the revocation of this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from all areas within the Honolulu District.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

No general comments were received in response to our public notice.

3.0 Discussion of applicability of NWP 24 in the Pacific Ocean Division's Honolulu District

Pursuant to 33 U.S.C. 1344(g)-(l), any Indian Tribe or state can administer its own Clean Water Act Section 404 Program. As of this time, the state of Hawaii has not, nor has any Native Hawaiian Organization (NHO), indicated any interest in taking the Section 404 program over from the federal government. The same is true for the governments of Guam, CNMI, and American Samoa. This process would entail the state, territorial government, and/or a NHO developing such a program for review and acceptance by the U.S. Environmental Protection Agency. This is a time-consuming process which would likely not occur before the expiration of the 2012 NWPs within the Honolulu District's area of responsibility.

13.0 Final Determination

Based on the considerations discussed above, and in accordance with 33 CFR 330.4(e)(1) and 330.5(c), I have determined that NWP 24 shall be revoked from use within the Honolulu District.

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 29 (Residential Developments)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 29, and addresses the revocation of this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from all areas within the Honolulu District.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

No general comments were received in response to our public notice.

3.0 Discussion of applicability of NWP 29 in the Pacific Ocean Division's Honolulu District

In the island jurisdictions that comprise the Honolulu District (POH) area of responsibility (AOR) there is a limited amount of land available for development and for any mitigation that would be required for authorized impacts. Because of the small size of each individual island and the scarcity of non-tidal aquatic resources on each island relative to other areas in the United States, even impacts that would be considered less than minimal elsewhere have the potential to be major on the islands in the POH AOR. Consequently, even with the requirements imposed by the general and regional conditions, there is a high potential for activities authorized by this NWP to have greater than minimal adverse impacts on the aquatic environment, both individually and cumulatively. Accordingly, review of these activities under the more rigorous standard individual permit process will ensure that alternatives not involving discharges into waters of the U.S. are pursued.

4.0 Final Determination

Based on the considerations discussed above, and in accordance with 33 CFR 330.4(e)(1) and 330.5(c), I have determined that this NWP, including its terms and conditions, all regional conditions, and limitations, have the potential to authorize activities with greater than minimal adverse effects on the aquatic environment, either individually or cumulatively and, therefore, this NWP shall be revoked from use within the Honolulu District.

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 34 (Cranberry Production Activities)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 34, and addresses the revocation of this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from all areas within the Honolulu District.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District (POH) considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

No general comments were received in response to our public notice.

3.0 Discussion of applicability of NWP 34 in the Pacific Ocean Division's Honolulu District

Cranberries are grown in northern climates around the world, normally in bogs, originally created by glacial deposits. All areas in the Honolulu District's (POH) area of responsibility (AOR), including the tops of the volcanoes on the Big Island of Hawaii, lack the climate necessary to produce a glacier. Lacking also are soil conditions including sandy soils, glacial gravels, and abundant fresh water. Cranberries are not, and will never be, a resource which will be grown in any water of the U.S. within the POH AOR.

13.0 Final Determination

Based on the considerations discussed above, and in accordance with 33 CFR 330.4(e)(1) and 330.5(c), I have determined that NWP 34 shall be revoked from use within the Honolulu District.

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 39 (Commercial and Institutional Developments)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 39, and addresses the revocation of this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from all areas within the Honolulu District.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

No general comments were received in response to our public notice.

3.0 Discussion of applicability of NWP 39 in the Pacific Ocean Division's Honolulu District

In the island jurisdictions that comprise the Honolulu District (POH) area of responsibility (AOR) there is a limited amount of land available for development and for any mitigation that would be required for authorized impacts. Because of the small size of each individual island and the scarcity of non-tidal aquatic resources on each island relative to other areas in the United States, even impacts that would be considered less than minimal elsewhere have the potential to be major on the islands in the POH AOR. Consequently, even with the requirements imposed by the general and regional conditions, there is a high potential for activities authorized by this NWP to have greater than minimal adverse impacts on the aquatic environment, both individually and cumulatively. Accordingly, review of these activities under the more rigorous standard individual permit process will ensure that alternatives not involving discharges into waters of the U.S. are pursued.

4.0 Final Determination

Based on the considerations discussed above, and in accordance with 33 CFR 330.4(e)(1) and 330.5(c), I have determined that NWP 39, including its terms and conditions, all regional conditions, and limitations, have the potential to authorize activities with greater than minimal adverse effects on the aquatic environment, either individually or cumulatively and, therefore, this NWP shall be revoked from use within the Honolulu District.

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 42 (Recreational Facilities)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 42, and addresses the revocation of this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from all areas within the Honolulu District.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

No general comments were received in response to our public notice.

3.0 Discussion of applicability of NWP 42 in the Pacific Ocean Division's Honolulu District

In the island jurisdictions that comprise the Honolulu District (POH) area of responsibility (AOR) there is a limited amount of land available for development and for any mitigation that would be required for authorized impacts. Because of the small size of each individual island and the scarcity of non-tidal aquatic resources on each island relative to other areas in the United States, even impacts that would be considered less than minimal elsewhere have the potential to be major on the islands in the POH AOR. Consequently, even with the requirements imposed by the general and regional conditions, there is a high potential for activities authorized by this NWP to have greater than minimal adverse impacts on the aquatic environment, both individually and cumulatively. Accordingly, review of these activities under the more rigorous standard individual permit process will ensure that alternatives not involving discharges into waters of the U.S. are pursued.

4.0 Final Determination

Based on the considerations discussed above, and in accordance with 33 CFR 330.4(e)(1) and 330.5(c), I have determined that NWP 42, including its terms and conditions, all regional conditions, and limitations, has the potential to authorize activities with greater than minimal adverse effects on the aquatic environment, either individually or cumulatively and, therefore, this NWP shall be revoked from use within the Honolulu District.

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 44 (Mining Activities)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 44, and addresses the revocation of this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from all areas within the Honolulu District.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

No general comments were received in response to our public notice.

3.0 Discussion of applicability of NWP 44 in the Pacific Ocean Division's Honolulu District

The vast area which makes up the Honolulu District (POH) area of responsibility (AOR) is comprised of a series of geographically isolated archipelagos, remnants of volcanic activity. Since the islands have evolved from volcanoes, they do not produce a product sought after in non-tidal waters using the mining process. While sand is produced from centuries of erosion, it is a commodity in great abundance out in the open ocean. This NWP does not permit mining in tidal waters of the U.S. Revocation of this NWP in the POH AOR will not increase paperwork for POH staff, as no requests for Department of the Army permits have ever been submitted for mining activities within the POH AOR.

13.0 Final Determination

Based on the considerations discussed above, and in accordance with 33 CFR 330.4(e)(1) and 330.5(c), I have determined that NWP 44 shall be revoked from use within the Honolulu District.

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 49 (Coal Remining Activities)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 49, and addresses the revocation of this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from all areas within the Honolulu District.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

No general comments were received in response to our public notice.

3.0 Discussion of applicability of NWP 49 in the Pacific Ocean Division's Honolulu District

The vast area which makes up the Honolulu District (POH) area of responsibility (AOR) is comprised of a series of geographically isolated archipelagos, remnants of volcanic activity. Since the islands have evolved from volcanoes, they are not geologically capable of producing coal, whether at the surface or deep underground. Coal is not a resource which is present and, therefore, will never be mined in any water of the U.S. within the POH AOR.

13.0 Final Determination

Based on the considerations discussed above, and in accordance with 33 CFR 330.4(e)(1) and 330.5(c), I have determined that NWP 49 shall be revoked from use within the Honolulu District.

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 50 (Underground Coal Mining Activities)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 50, and addresses the revocation of this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from all areas within the Honolulu District.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

No general comments were received in response to our public notice.

3.0 Discussion of applicability of NWP 50 in the Pacific Ocean Division's Honolulu District

The vast area which makes up the Honolulu District (POH) area of responsibility (AOR) is comprised of a series of geographically isolated archipelagos, remnants of volcanic activity. Since the islands have evolved from volcanoes, they are not geologically capable of producing coal, whether at the surface or deep underground. Coal is not a resource which is present and, therefore, will never be mined in any water of the U.S. within the POH AOR.

13.0 Final Determination

Based on the considerations discussed above, and in accordance with 33 CFR 330.4(e)(1) and 330.5(c), I have determined that NWP 50 shall be revoked from use within the Honolulu District.

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 52
(Water-Based Renewable Energy Generation Pilot Projects)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 52, and addresses the revocation of this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from all areas within the Honolulu District.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

No general comments were received in response to our public notice.

3.0 Discussion of applicability of NWP 52 in the Pacific Ocean Division's Honolulu District

The island jurisdictions that comprise the POH FOA are characterized by small, steep watersheds, with the islands themselves being surrounded by comparatively narrow reef flats. The close proximity of adjacent human development activities places high levels of stress upon the nearshore marine resources and the relatively small number of perennial streams and rivers that exist in these islands. Impacts that may be considered to be minimal in others of the United States have a high potential to be major in the islands. Consequently, even with the requirements imposed by the general and regional conditions, there is a high potential for activities authorized by this NWP to have greater than minimal adverse impacts on the aquatic environment, both individually and cumulatively. Accordingly, review of these activities under the more rigorous standard individual permit process will ensure that alternatives not involving discharges into waters of the U.S. are pursued.

4.0 Final Determination

Based on the considerations discussed above, and in accordance with 33 CFR 330.4(e)(1) and 330.5(c), I have determined that NWP 52, including its terms and conditions, all regional conditions, and limitations, have the potential to authorize activities with greater than minimal adverse effects on the aquatic environment, either individually or cumulatively and, therefore, this NWP shall be revoked from use within the Honolulu District.

Section 10 Only NWP

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 1 (Aids to Navigation)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 1, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management Practices (BMPs)”. It also contained the “Definition of Coral Reefs”. Our February 18, 2011 PN proposed keeping these two advisories and eliminating the “Definition of Coral Reefs”.

We removed this section as an advisory because it is has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the “Use of Embedded or Bottomless Arch Culverts” advisory into it as the advisory was specific to only certain NWP’s and we felt that by creating a new RC, the public would better informed as to its applicability to those specific NWP’s. We also incorporated the resource agencies comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for “Site-Specific Best Management Practices (BMPs)” and a Regional Condition for “Standard Best Management Practices” and have combined the two into RC 2 (Regional Conditions that apply to all NWP’s in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the “Definition of Coral Reefs” to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP’s.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP’s 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP’s 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP’s 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC e to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas," to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resource functions, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. Aids to navigation have the potential, through their mooring apparatus and anchoring system to impact protected or endangered species. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401

WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

No waters were excluded from the use of NWP 1.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, all NWPs will require submittals of a PCN to POH.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under NWP 1 have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent usage of NWP 1 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually minimal

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the POH project manager will follow the Standard Operating Procedure (SOP) described below.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to

threatened or endangered species. The 2012 NWP's General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWP's, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an "Effect" determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWP's.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an "Effect" determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a

coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs prohibit projects if it is determined that it may affect properties, listed or eligible for listing, in the NRHP until the requirements of Section 106 of the NHPA have been satisfied. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson of Daughters of Hawaii did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other

permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs prohibit projects if it is determined that it may affect properties, listed or eligible for listing, in the NRHP until the requirements of Section 106 of the NHPA have been satisfied. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP..

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential

impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: This NWP authorizes activities in navigable waters of the United States, including marine, estuarine, and riverine waters, which provide habitat to many species of fish and wildlife. Activities authorized by this NWP may alter the habitat characteristics of open water, decreasing the quantity and quality of fish habitat. Open waters provide habitat for fish and other aquatic organisms. The district engineer may require compensatory mitigation to restore, enhance, establish, and/or preserve aquatic habitats to offset losses of waters of the United States. Any required compensatory mitigation will provide fish habitat values.

General condition 2 will reduce the adverse effects to fish and other aquatic species by prohibiting activities that substantially disrupt the movements of indigenous aquatic species, unless the primary purpose of the activity is to impound water. Compliance with general conditions 3 and 5 will ensure that the authorized work has minimal adverse effects on spawning areas and shellfish beds, respectively. The authorized work cannot have more than minimal

adverse effects on breeding areas for migratory birds, due to the requirements of general condition 4.

Compliance with the Bald and Golden Eagle Protection Act (16 U.S.C. 668(a)-(d)), the Migratory Bird Treaty Act (16 U.S.C. 703; 16 U.S.C. 712), and the Marine Mammal Protection Act (16 U.S.C. 1361 et seq.), including any requirements to obtain take permits, is the responsibility of the project proponent for a particular NWP activity.

Pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, the Honolulu District will consult with NOAA NMFS HCD on proposed NWP activities that may adversely affect essential fish habitat. The Coral Reef Advisory in the RC document may help increase awareness of coral reefs, and RC 2, which requires a PCN for all activities, and the exclusion under RC 1 will both help to ensure that activities authorized by this NWP will result in no more than minimal adverse effects on coral reef habitat.

- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of

the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI. The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, the use of the NWP considered in this document which was verified during the past five years resulted in the aggregate loss of approximately 0.014 acres of waters of the U.S. (assuming an average of 100 sq ft per navigational aid). The POH estimates that this NWP will be used approximately two times per year, resulting in the loss of approximately 0.028 acres of waters of the United States in the next five years. For these unavoidable losses of waters of the U.S., no compensatory mitigation was required. We have no scientific evidence, anecdotal or empirical, to suggest the loss of 0.014 acres of waters of the U.S. has resulted in a significant cumulative adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to be infrequent and therefore, the cumulative effects to the aquatic environment will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 1

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

NWP 21 - Surface Coal Mining Activities
NWP 29 - Residential Developments
NWP 34 - Cranberry Production Activities
NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges
NWP 25 - Structural Discharges
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 30, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation or, under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

- a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:
 - (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
 - (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.

(3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or

enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to

minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

**8. State of Hawaii, Department of Health, Clean Water Branch (DOH)
Requirements (Projects in the State of Hawaii Only)**

- a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

- b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

- c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:
 - (1) Identify the waterbody as an Impaired Water; and
 - (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

- d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without

adequate records may be considered illegal dumping and subject to enforcement action.

11.0 Water Quality Certification and Coastal Zone Management Act Consistency Determinations

11.1 Water Quality Certification

At the time these documents were prepared, the final state certification for the Hawaii Section 401 Water Quality Certification had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 WQCs) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWPs, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWPs. While no blanket WQC was issued for Hawaii for the 2007 NWPs, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWPs, which we found to be reasonable and not result in a denial of any one or number of NWPs for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWPs in Guam, providing blanket certification for NWPs 5, 6, 15, 20, 25, 30, 32, 36, 37, 38, and conditional certification for NWPs 4, 22, and 27. American Samoa and CNMI were undecided as to final certification of the NWPs at the time of this writing. As is the case with any DA authorization, verification of a NWP does not obviate the need for any other Federal, State or local authorization.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWPs 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination. The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWPs at this time. For the above reasons, the NWPs

are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI. As is the case with any DA authorization, verification of a NWP does not obviate the need for any other Federal, State or local authorization.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 2 (Structures in Artificial Canals)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 2, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management Practices (BMPs)”. It also contained the “Definition of Coral Reefs”. Our February 18, 2011

PN proposed keeping these two advisories and eliminating the “Definition of Coral Reefs”.

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the “Use of Embedded or Bottomless Arch Culverts” advisory into it as the advisory was specific to only certain NWP’s and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP’s. We also incorporated the resource agencies’ comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for “Site-Specific Best Management Practices (BMPs)” and a Regional Condition for “Standard Best Management Practices” and have combined the two into RC 2 (Regional Conditions that apply to all NWP’s in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the “Definition of Coral Reefs” to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP’s.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP’s 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP’s 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP’s 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas," to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

No waters are excluded from the use of NWP 2.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, all NWPs will require submittals of a PCN to POH.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under NWP 2 have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent usage of NWP 2 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually minimal

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to

threatened or endangered species. The 2012 NWP's General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWP's, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an "Effect" determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWP's.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an "Effect" determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a

coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs prohibit projects if it is determined that it may affect properties, listed or eligible for listing, in the NRHP until the requirements of Section 106 of the NHPA have been satisfied. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson of Daughters of Hawaii did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other

permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs prohibit projects if it is determined that it may affect properties, listed or eligible for listing, in the NRHP until the requirements of Section 106 of the NHPA have been satisfied. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential

impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: This NWP authorizes activities in navigable waters of the United States, including marine, estuarine, and riverine waters, which provide habitat to many species of fish and wildlife. Activities authorized by this NWP may alter the habitat characteristics of open water, decreasing the quantity and quality of fish habitat. Open waters provide habitat for fish and other aquatic organisms. The district engineer may require compensatory mitigation to restore, enhance, establish, and/or preserve aquatic habitats to offset losses of waters of the United States. Any required compensatory mitigation will provide fish habitat values.

General condition 2 will reduce the adverse effects to fish and other aquatic species by prohibiting activities that substantially disrupt the movements of indigenous aquatic species, unless the primary purpose of the activity is to impound water. Compliance with general conditions 3 and 5 will ensure that the authorized work has minimal adverse effects on spawning areas and shellfish beds, respectively. The authorized work cannot have more than minimal adverse effects on breeding areas for migratory birds, due to the requirements of general

condition 4.

Compliance with the Bald and Golden Eagle Protection Act (16 U.S.C. 668(a)-(d)), the Migratory Bird Treaty Act (16 U.S.C. 703; 16 U.S.C. 712), and the Marine Mammal Protection Act (16 U.S.C. 1361 et seq.), including any requirements to obtain take permits, is the responsibility of the project proponent for a particular NWP activity.

Pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, the Honolulu District will consult with NOAA NMFS HCD on proposed NWP activities that may adversely affect essential fish habitat. The Coral Reef Advisory in the RC document may help increase awareness of coral reefs, and RC 2, which requires a PCN for all activities, and the exclusion under RC 1 will both help to ensure that activities authorized by this NWP will result in no more than minimal adverse effects on coral reef habitat.

- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks

and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI. The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, the use of the NWP considered in this document which was verified during the past five years resulted in the aggregate loss of approximately 0.0004 acres of waters of the U.S. (assuming an average of 16 sq ft per structure). The POH estimates that this NWP will be used approximately two times per year, resulting in the loss of approximately 0.004 acres of waters of the United States in the next five years. For these unavoidable losses of waters of the U.S., no compensatory mitigation was required. We have no scientific evidence, anecdotal or empirical, to suggest the loss of 0.004 acres of waters of the U.S. has resulted in a significant cumulative adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to be infrequent and therefore, the cumulative effects to the aquatic environment will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 2

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

NWP 21 - Surface Coal Mining Activities

NWP 29 - Residential Developments
NWP 34 - Cranberry Production Activities
NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges

NWP 25 - Structural Discharges
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 30, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

- a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:
 - (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
 - (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.

(3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or

enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to

minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

**8. State of Hawaii, Department of Health, Clean Water Branch (DOH)
Requirements (Projects in the State of Hawaii Only)**

- a. You must obtain a Clean Water Act (CWA) Section 401 WQC from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.
- b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.
- c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:
 - (1) Identify the waterbody as an Impaired Water; and
 - (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.
- d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

11.0 Water Quality Certification and Coastal Zone Management Act Consistency Determinations

11.1 Water Quality Certification

At the time these documents were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 WQCs) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWP's, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP's. While no blanket WQC was issued for Hawaii for the 2007 NWP's, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP's, which we found to be reasonable and not result in a denial of any one or number of NWP's for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam, providing blanket certification for NWP's 5, 6, 15, 20, 25, 30, 32, 36, 37, 38, and conditional certification for NWP's 4, 22, and 27. American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing. As is the case with any DA authorization, verification of a NWP does not obviate the need for any other Federal, State or local authorization.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination. The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. For the above reasons, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI. As is the case with any DA authorization, verification of a NWP does not obviate the need for any other Federal, State or local authorization.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 8
(Oil and Gas Structures on the Outer Continental Shelf)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 8, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

No waters were excluded from the use of NWP 8.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, all NWPs will require submittals of a PCN to POH.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under NWP 8 have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent usage of NWP 8 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to

threatened or endangered species. The 2012 NWP's General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWP's, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an "Effect" determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWP's.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an "Effect" determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a

coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs prohibit projects if it is determined that it may affect properties, listed or eligible for listing, in the NRHP until the requirements of Section 106 of the NHPA have been satisfied. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson of Daughters of Hawaii did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other

permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs prohibit projects if it is determined that it may affect properties, listed or eligible for listing, in the NRHP until the requirements of Section 106 of the NHPA have been satisfied. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential

impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: This NWP authorizes activities in navigable waters of the United States, including marine, estuarine, and riverine waters, which provide habitat to many species of fish and wildlife. Activities authorized by this NWP may alter the habitat characteristics of open water, decreasing the quantity and quality of fish habitat. Open waters provide habitat for fish and other aquatic organisms. The district engineer may require compensatory mitigation to restore, enhance, establish, and/or preserve aquatic habitats to offset losses of waters of the United States. Any required compensatory mitigation will provide fish habitat values.

General condition 2 will reduce the adverse effects to fish and other aquatic species by prohibiting activities that substantially disrupt the movements of indigenous aquatic species, unless the primary purpose of the activity is to impound water. Compliance with general conditions 3 and 5 will ensure that the authorized work has minimal adverse effects on spawning areas and shellfish beds, respectively. The authorized work cannot have more than minimal

adverse effects on breeding areas for migratory birds, due to the requirements of general condition 4.

Compliance with the Bald and Golden Eagle Protection Act (16 U.S.C. 668(a)-(d)), the Migratory Bird Treaty Act (16 U.S.C. 703; 16 U.S.C. 712), and the Marine Mammal Protection Act (16 U.S.C. 1361 et seq.), including any requirements to obtain take permits, is the responsibility of the project proponent for a particular NWP activity.

Pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, the Honolulu District will consult with NOAA NMFS HCD on proposed NWP activities that may adversely affect essential fish habitat. The Coral Reef Advisory in the RC document may help increase awareness of coral reefs, and RC 2, which requires a PCN for all activities, and the exclusion under RC 1 will both help to ensure that activities authorized by this NWP will result in no more than minimal adverse effects on coral reef habitat.

- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of

the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI. The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has not authorized oil and gas structure construction on the outer continental shelf using the NWP considered in this document during the past five years. Moreover, the POH estimates that this NWP will not be requested for verification in the next five years as the geomorphological formations seaward of the main islands within the district are not suitable for oil and gas exploration thus, eliminating proposals to erect structures off-shore. We therefore do not anticipate any adverse impacts resulting from re-issuance of NWP 8.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to be infrequent and therefore, the cumulative effects to the aquatic environment will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 8

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

NWP 21 - Surface Coal Mining Activities
NWP 29 - Residential Developments
NWP 34 - Cranberry Production Activities
NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges
NWP 25 - Structural Discharges
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 30, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation or, under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

- a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:
 - (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
 - (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.

(3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWPs: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by State WQC conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is

commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to

minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

- a. You must obtain a Clean Water Act (CWA) Section 401 WQC from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.
- b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.
- c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:
 - (1) Identify the waterbody as an Impaired Water; and
 - (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.
- d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these documents were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 WQCs) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWP's, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP's. While no blanket WQC was issued for Hawaii for the 2007 NWP's, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP's, which we found to be reasonable and not result in a denial of any one or number of NWP's for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam, providing blanket certification for NWP's 5, 6, 15, 20, 25, 30, 32, 36, 37, 38, and conditional certification for NWP's 4, 22, and 27. American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing. As is the case with any DA authorization, verification of a NWP does not obviate the need for any other Federal, State or local authorization.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination. The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. For the above reasons, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI. As is the case with any DA authorization, verification of a NWP does not obviate the need for any other Federal, State or local authorization.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 9
(Structures in Fleeting & Anchorage Areas)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 9, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management Practices (BMPs)”. It also contained the “Definition of Coral Reefs”. Our February 18, 2011

PN proposed keeping these two advisories and eliminating the “Definition of Coral Reefs”.

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the “Use of Embedded or Bottomless Arch Culverts” advisory into it as the advisory was specific to only certain NWP’s and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP’s. We also incorporated the resource agencies’ comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for “Site-Specific Best Management Practices (BMPs)” and a Regional Condition for “Standard Best Management Practices” and have combined the two into RC 2 (Regional Conditions that apply to all NWP’s in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the “Definition of Coral Reefs” to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP’s.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP’s 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP’s 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP’s 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). This RC is applicable because it will result in a minimization of impacts to protected or endangered species as a result of work performed under this NWP.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

No waters were excluded from the use of NWP 9.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, all NWPs will require submittals of a PCN to POH.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under NWP 9 have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent usage of NWP 9 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to

threatened or endangered species. The 2012 NWP's General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWP's, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an "Effect" determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWP's.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an "Effect" determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a

coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs prohibit projects if it is determined that it may affect properties, listed or eligible for listing, in the NRHP until the requirements of Section 106 of the NHPA have been satisfied. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson of Daughters of Hawaii did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other

permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs prohibit projects if it is determined that it may affect properties, listed or eligible for listing, in the NRHP until the requirements of Section 106 of the NHPA have been satisfied. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential

impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: This NWP authorizes activities in navigable waters of the United States, including marine, estuarine, and riverine waters, which provide habitat to many species of fish and wildlife. Activities authorized by this NWP may alter the habitat characteristics of open water, decreasing the quantity and quality of fish habitat. Open waters provide habitat for fish and other aquatic organisms. The district engineer may require compensatory mitigation to restore, enhance, establish, and/or preserve aquatic habitats to offset losses of waters of the United States. Any required compensatory mitigation will provide fish habitat values.

General condition 2 will reduce the adverse effects to fish and other aquatic species by prohibiting activities that substantially disrupt the movements of indigenous aquatic species, unless the primary purpose of the activity is to impound water. Compliance with general conditions 3 and 5 will ensure that the authorized work has minimal adverse effects on spawning areas and shellfish beds, respectively. The authorized work cannot have more than minimal

adverse effects on breeding areas for migratory birds, due to the requirements of general condition 4.

Compliance with the Bald and Golden Eagle Protection Act (16 U.S.C. 668(a)-(d)), the Migratory Bird Treaty Act (16 U.S.C. 703; 16 U.S.C. 712), and the Marine Mammal Protection Act (16 U.S.C. 1361 et seq.), including any requirements to obtain take permits, is the responsibility of the project proponent for a particular NWP activity.

Pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, the Honolulu District will consult with NOAA NMFS HCD on proposed NWP activities that may adversely affect essential fish habitat. The Coral Reef Advisory in the RC document may help increase awareness of coral reefs, and RC 2, which requires a PCN for all activities, and the exclusion under RC 1 will both help to ensure that activities authorized by this NWP will result in no more than minimal adverse effects on coral reef habitat.

- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of

the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI. The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, the use of the NWP considered in this document which was verified during the past five years resulted in the aggregate loss of approximately 0.055 acres of waters of the U.S. The POH estimates that this NWP will be used approximately two times per year, resulting in the loss of approximately 0.092 acres of waters of the United States in the next five years. For these unavoidable losses of waters of the U.S., no compensatory mitigation was required. We have no scientific evidence, anecdotal or empirical, to suggest the loss of 0.055 acres of waters of the U.S. has resulted in a significant cumulative adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to be infrequent and therefore, the cumulative effects to the aquatic environment will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 9

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

NWP 21 - Surface Coal Mining Activities
NWP 29 - Residential Developments
NWP 34 - Cranberry Production Activities
NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges
NWP 25 - Structural Discharges
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 30, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation or, under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

- a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:
 - (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
 - (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.

(3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Corps as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by State WQC conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is

commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to

minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

**8. State of Hawaii, Department of Health, Clean Water Branch (DOH)
Requirements (Projects in the State of Hawaii Only)**

a. You must obtain a Clean Water Act (CWA) Section 401 WQC from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these documents were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 WQCs) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWP's, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP's. While no blanket WQC was issued for Hawaii for the 2007 NWP's, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP's, which we found to be reasonable and not result in a denial of any one or number of NWP's for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam, providing blanket certification for NWP's 5, 6, 15, 20, 25, 30, 32, 36, 37, 38, and conditional certification for NWP's 4, 22, and 27. American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing. As is the case with any DA authorization, verification of a NWP does not obviate the need for any other Federal, State or local authorization.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination. The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. For the above reasons, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI. As is the case with any DA authorization, verification of a NWP does not obviate the need for any other Federal, State or local authorization.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 10 (Mooring Buoys)

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

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management Practices (BMPs)”. It also contained the “Definition of Coral Reefs”. Our February 18, 2011 PN proposed keeping these two advisories and eliminating the “Definition of Coral Reefs”.

We removed this section as an advisory because it is has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the “Use of Embedded or Bottomless Arch Culverts” advisory into it as the advisory was specific to only certain NWP’s and we felt that by creating a new RC, the public would better informed as to its applicability to those specific NWP’s. We also incorporated the resource agencies’ comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for “Site-Specific Best Management Practices (BMPs)” and a Regional Condition for “Standard Best Management Practices” and have combined the two into RC 2 (Regional Conditions that apply to all NWP’s in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the “Definition of Coral Reefs” to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP’s.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP’s 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP’s 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP’s 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas," to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively..

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species..

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

No waters were excluded from the use of NWP 10.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, all NWPs will require submittals of a PCN to POH.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under NWP 10 have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent usage of NWP 10 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to

threatened or endangered species. The 2012 NWP's General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWP's, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an "Effect" determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWP's.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an "Effect" determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a

coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs prohibit projects if it is determined that it may affect properties, listed or eligible for listing, in the NRHP until the requirements of Section 106 of the NHPA have been satisfied. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson of Daughters of Hawaii did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other

permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs prohibit projects if it is determined that it may affect properties, listed or eligible for listing, in the NRHP until the requirements of Section 106 of the NHPA have been satisfied. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential

impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

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

(b) Economics: Same as discussed in the national decision document.

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

(d) General environmental concerns: Authorization for the installation of mooring buoys in navigable waters by this NWP may increase and/or concentrate recreational boating traffic and access to open water areas. As a result the potential for adverse impacts to the aquatic environment is expected. This district does not anticipate a significant increase in new applicants requesting authorization for buoys under this NWP; therefore, the impacts to the marine environment will be no more than minimal. In addition, the use of single-anchor mooring buoys will benefit special aquatic sites such as sea grass beds and coral reefs by creating permanent, regulated mooring areas, thereby eliminating adverse impacts resulting from repeated anchor droppings in different locations.

(e) Wetlands: Same as discussed in the national decision document.

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

(g) Fish and wildlife values: This NWP authorizes activities in navigable waters of the United States, including marine, estuarine, and riverine waters, which provide habitat to many species of fish and wildlife. Activities authorized by this NWP may alter the habitat characteristics of open water, decreasing the quantity and quality of fish habitat. Open waters provide habitat for fish and other aquatic organisms. The district engineer may require compensatory mitigation to restore, enhance, establish, and/or preserve aquatic habitats to offset losses of waters of the

United States. Any required compensatory mitigation will provide fish habitat values.

General condition 2 will reduce the adverse effects to fish and other aquatic species by prohibiting activities that substantially disrupt the movements of indigenous aquatic species, unless the primary purpose of the activity is to impound water. Compliance with general conditions 3 and 5 will ensure that the authorized work has minimal adverse effects on spawning areas and shellfish beds, respectively. The authorized work cannot have more than minimal adverse effects on breeding areas for migratory birds, due to the requirements of general condition 4.

Compliance with the Bald and Golden Eagle Protection Act (16 U.S.C. 668(a)-(d)), the Migratory Bird Treaty Act (16 U.S.C. 703; 16 U.S.C. 712), and the Marine Mammal Protection Act (16 U.S.C. 1361 et seq.), including any requirements to obtain take permits, is the responsibility of the project proponent for a particular NWP activity.

Pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, the Honolulu District will consult with NOAA NMFS HCD on proposed NWP activities that may adversely affect essential fish habitat. The Coral Reef Advisory in the RC document may help increase awareness of coral reefs, and RC 2, which requires a PCN for all activities, and the exclusion under RC 1 will both help to ensure that activities authorized by this NWP will result in no more than minimal adverse effects on coral reef habitat.

- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.

(t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI. The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, the use of the NWP considered in this document which was verified during the past five years resulted in the aggregate loss of approximately 0.014 acres of waters of the U.S. (assuming an average of 100 sq ft per mooring buoy). The POH estimates that this NWP will be used approximately two times per year, resulting in the loss of approximately 0.028 acres of waters of the United States in the next five years. For these unavoidable losses of waters of the U.S., no compensatory mitigation was required. We have no scientific evidence, anecdotal or empirical, to suggest the loss of 0.014 acres of waters of the U.S. has resulted in a significant cumulative adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to be infrequent and therefore, the cumulative effects to the aquatic environment will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 10

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

NWP 21 - Surface Coal Mining Activities
NWP 29 - Residential Developments
NWP 34 - Cranberry Production Activities
NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities

NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWP's may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures

NWP 12 - Utility Line Activities

NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges

NWP 25 - Structural Discharges

NWP 40 - Agricultural Activities

NWP 41 - Reshaping Existing Drainage Ditches

NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWP's in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 30, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWP's within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the

Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions,

attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain

stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:
<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

- a. You must obtain a Clean Water Act (CWA) Section 401 WQC from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.
- b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.
- c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:
 - (1) Identify the waterbody as an Impaired Water; and
 - (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.
- d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The

generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 8 - Mooring Buoys.

Within 7 days of installation of a mooring buoy authorized by NWP 10 (Mooring Buoys), you must provide the coordinates of its location to the Honolulu District.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these documents were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 WQCs) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWPs, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWPs. While no blanket WQC was issued for Hawaii for the 2007 NWPs, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWPs, which we found to be reasonable and not result in a denial of any one or number of NWPs for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWPs in Guam, providing blanket certification for NWPs 5, 6, 15, 20, 25, 30, 32, 36, 37, 38, and conditional certification for NWPs 4, 22, and 27. American Samoa and CNMI were undecided as to final certification of the NWPs at the time of this writing. As is the case with any DA authorization, verification of a NWP does not obviate the need for any other Federal, State or local authorization.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic

Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination. The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWPs at this time. For the above reasons, the NWPs are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI. As is the case with any DA authorization, verification of a NWP does not obviate the need for any other Federal, State or local authorization.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 11 (Temporary Recreational Structures)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 11, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management Practices (BMPs)”. It also contained the “Definition of Coral Reefs”. Our February 18, 2011

PN proposed keeping these two advisories and eliminating the “Definition of Coral Reefs”.

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the “Use of Embedded or Bottomless Arch Culverts” advisory into it as the advisory was specific to only certain NWP’s and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP’s. We also incorporated the resource agencies’ comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for “Site-Specific Best Management Practices (BMPs)” and a Regional Condition for “Standard Best Management Practices” and have combined the two into RC 2 (Regional Conditions that apply to all NWP’s in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the “Definition of Coral Reefs” to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP’s.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP’s 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP’s 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP’s 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation.

This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this

NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

No waters were excluded from use of NWP 11.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, all NWPs will require submittals of a PCN to POH.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under NWP 11 have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent usage of NWP 11 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If

the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWPs, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWPs.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other

available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs prohibit projects if it is determined that it may affect properties, listed or eligible for listing, in the NRHP until the requirements of Section 106 of the NHPA have been satisfied. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff’s time.

Ms. Dale Bachman and Ms. Shannon Wilson of Daughters of Hawaii did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under

the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to “flag” applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs prohibit projects if it is determined that it may affect properties, listed or eligible for listing, in the NRHP until the requirements of Section 106 of the NHPA have been satisfied. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.

(g) Fish and wildlife values:

This NWP authorizes activities in navigable waters of the United States, including marine, estuarine, and riverine waters, which provide habitat to many species of fish and wildlife. Activities authorized by this NWP may alter the habitat characteristics of open water, decreasing the quantity and quality of fish habitat. Open waters provide habitat for fish and other aquatic organisms. The district engineer may require compensatory mitigation to restore, enhance, establish, and/or preserve aquatic habitats to offset losses of waters of the United States. Any required compensatory mitigation will provide fish habitat values.

General condition 2 will reduce the adverse effects to fish and other aquatic species by prohibiting activities that substantially disrupt the movements of indigenous aquatic species, unless the primary purpose of the activity is to impound water. Compliance with general conditions 3 and 5 will ensure that the authorized work has minimal adverse effects on spawning areas and shellfish beds, respectively. The authorized work cannot have more than minimal adverse effects on breeding areas for migratory birds, due to the requirements of general condition 4.

Compliance with the Bald and Golden Eagle Protection Act (16 U.S.C. 668(a)-(d)), the Migratory Bird Treaty Act (16 U.S.C. 703; 16 U.S.C. 712), and the Marine Mammal Protection Act (16 U.S.C. 1361 et seq.), including any requirements to obtain take permits, is the responsibility of the project proponent for a particular NWP activity.

Pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, the Honolulu District will consult with NOAA NMFS HCD on proposed NWP activities that may adversely affect essential fish habitat. The Coral Reef Advisory in the RC document may help increase awareness of coral reefs, and RC 2, which requires a PCN for all activities, and the exclusion under RC 1 will both help to ensure that activities authorized by this NWP will result in no more than minimal adverse effects on coral reef habitat.

- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI. The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, the use of the NWP considered in this document which was verified four times during the past five years and resulted in the aggregate, temporary loss of approximately 0.054 acres of waters of the U.S. (assuming an average of 871 square feet per temporary recreational structure). The POH estimates that this NWP will be used approximately two times per year, resulting in the temporary loss of approximately 0.028 acres of waters of the United States in the next five years. For these temporary and unavoidable losses of waters of the U.S., no compensatory mitigation was required. We have no scientific evidence, anecdotal or empirical, to suggest the loss of 0.054 acres of waters of the U.S. has resulted in a significant cumulative adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to be infrequent and therefore, the cumulative effects to the aquatic environment will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 11

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

NWP 21 - Surface Coal Mining Activities
NWP 29 - Residential Developments
NWP 34 - Cranberry Production Activities
NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities

NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWP's may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures

NWP 12 - Utility Line Activities

NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges

NWP 25 - Structural Discharges

NWP 40 - Agricultural Activities

NWP 41 - Reshaping Existing Drainage Ditches

NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWP's in the Honolulu District

a. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 30, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

b. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

c. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWP's within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation or, under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the

Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions,

attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain

stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:
<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

- a. You must obtain a Clean Water Act (CWA) Section 401 WQC from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.
- b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.
- c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:
 - (1) Identify the waterbody as an Impaired Water; and
 - (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.
- d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The

generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 WQCs) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWP's, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP's. While no blanket WQC was issued for Hawaii for the 2007 NWP's, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP's, which we found to be reasonable and not result in a denial of any one or number of NWP's for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam, providing blanket certification for NWP's 5, 6, 15, 20, 25, 30, 32, 36, 37, 38, and conditional certification for NWP's 4, 22, and 27. American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing. As is the case with any DA authorization, verification of a NWP does not obviate the need for any other Federal, State or local authorization.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination. The Guam Bureau of Statistics and Plans

denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. For the above reasons, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI. As is the case with any DA authorization, verification of a NWP does not obviate the need for any other Federal, State or local authorization.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 28 (Modifications of Existing Marinas)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 28, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management Practices (BMPs)”. It also contained the “Definition of Coral Reefs”. Our February 18, 2011 PN proposed keeping these two advisories and eliminating the “Definition of Coral Reefs”.

We removed this section as an advisory because it is has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the “Use of Embedded or Bottomless Arch Culverts” advisory into it as the advisory was specific to only certain NWP’s and we felt that by creating a new RC, the public would better informed as to its applicability to those specific NWP’s. We also incorporated the resource agencies’ comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for “Site-Specific Best Management Practices (BMPs)” and a Regional Condition for “Standard Best Management Practices” and have combined the two into RC 2 (Regional Conditions that apply to all NWP’s in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs))We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the “Definition of Coral Reefs” to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP’s.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP’s 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP’s 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP’s 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas," to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species..

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species..

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

No waters were excluded from the use of NWP 28.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, all NWPs will require submittals of a PCN to POH.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under NWP 28 have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent usage of NWP 28 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to

threatened or endangered species. The 2012 NWP's General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWP's, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an "Effect" determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWP's.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an "Effect" determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a

coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs prohibit projects if it is determined that it may affect properties, listed or eligible for listing, in the NRHP until the requirements of Section 106 of the NHPA have been satisfied. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson of Daughters of Hawaii did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other

permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs prohibit projects if it is determined that it may affect properties, listed or eligible for listing, in the NRHP until the requirements of Section 106 of the NHPA have been satisfied. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential

impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Impacts to the surrounding marine environment are anticipated to be minimal as the NW authorizes modifications only in existing marinas where the aquatic environment has already sustained impacts, of which those impacts have previously been evaluated and authorized. Further, modifications to existing marinas may not increase the existing structural footprint; accordingly, we do not anticipate impacts authorized under this NW to exceed minimal levels and/or those resulting from the current impacts of the marina.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: This NWP authorizes activities in navigable waters of the United States, including marine, estuarine, and riverine waters, which provide habitat to many species of fish and wildlife. Activities authorized by this NWP may alter the habitat characteristics of open water, decreasing the quantity and quality of fish habitat. Open waters provide habitat for fish and other aquatic organisms. The district engineer may require compensatory mitigation to restore, enhance, establish, and/or preserve aquatic habitats to offset losses of waters of the United States. Any required compensatory mitigation will provide fish habitat values.

General condition 2 will reduce the adverse effects to fish and other aquatic species by

prohibiting activities that substantially disrupt the movements of indigenous aquatic species, unless the primary purpose of the activity is to impound water. Compliance with general conditions 3 and 5 will ensure that the authorized work has minimal adverse effects on spawning areas and shellfish beds, respectively. The authorized work cannot have more than minimal adverse effects on breeding areas for migratory birds, due to the requirements of general condition 4.

Compliance with the Bald and Golden Eagle Protection Act (16 U.S.C. 668(a)-(d)), the Migratory Bird Treaty Act (16 U.S.C. 703; 16 U.S.C. 712), and the Marine Mammal Protection Act (16 U.S.C. 1361 et seq.), including any requirements to obtain take permits, is the responsibility of the project proponent for a particular NWP activity.

Pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, the Honolulu District will consult with NOAA NMFS HCD on proposed NWP activities that may adversely affect essential fish habitat. The Coral Reef Advisory in the RC document may help increase awareness of coral reefs, and RC 2, which requires a PCN for all activities, and the exclusion under RC 1 will both help to ensure that activities authorized by this NWP will result in no more than minimal adverse effects on coral reef habitat.

- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI. The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has not authorized modifications of existing marinas using the NWP considered in this document during the past five years. The POH estimates that this NWP may be used approximately two times per year, anticipating approximately 100 acres (assuming an average of 10 acres per modification to an existing marina) of temporary impact to waters of the United States in the next five years. For these unavoidable impacts to waters of the U.S., no compensatory mitigation is anticipated to be required for these temporal impacts. We have no scientific evidence, anecdotal or empirical, to suggest the temporary impact to 100 acres of waters of the U.S. will result in a significant cumulative adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized temporary impacts to waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to be infrequent and therefore, the cumulative effects to the aquatic environment will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 28

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

NWP 21 - Surface Coal Mining Activities
NWP 29 - Residential Developments
NWP 34 - Cranberry Production Activities
NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities

NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWP's may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures

NWP 12 - Utility Line Activities

NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges

NWP 25 - Structural Discharges

NWP 40 - Agricultural Activities

NWP 41 - Reshaping Existing Drainage Ditches

NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWP's in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 30, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWP's within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the

Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.

h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration

techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

a. You must obtain a Clean Water Act (CWA) Section 401 WQC from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes "...earth, soil, rocks, and rock-like materials... The fill material

shall not contain vegetation or other organic material, or other solid waste.” The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 WQCs) indicated by personal communication that it was the Department’s intent to issue a blanket certification for approximately 7 NWP’s, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP’s. While no blanket WQC was issued for Hawaii for the 2007 NWP’s, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP’s, which we found to be reasonable and not result in a denial of any one or number of NWP’s for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP’s in Guam, providing blanket certification for NWP’s 5, 6, 15, 20, 25, 30, 32, 36, 37, 38, and conditional certification for NWP’s 4, 22, and 27. American Samoa and CNMI were undecided as to final certification of the NWP’s at the time of this writing. As is the case with any DA authorization, verification of a NWP does not obviate the need for any other Federal, State or local authorization.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP’s 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional

conditions as a part of their consistency determination. The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. For the above reasons, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI. As is the case with any DA authorization, verification of a NWP does not obviate the need for any other Federal, State or local authorization.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 35 (Maintenance Dredging of Existing Marinas)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 35, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management Practices (BMPs)”. It also contained the “Definition of Coral Reefs”. Our February 18, 2011 PN proposed keeping these two advisories and eliminating the “Definition of Coral Reefs”.

We removed this section as an advisory because it is has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the “Use of Embedded or Bottomless Arch Culverts” advisory into it as the advisory was specific to only certain NWP’s and we felt that by creating a new RC, the public would better informed as to its applicability to those specific NWP’s. We also incorporated the resource agencies’ comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for “Site-Specific Best Management Practices (BMPs)” and a Regional Condition for “Standard Best Management Practices” and have combined the two into RC 2 (Regional Conditions that apply to all NWP’s in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the “Definition of Coral Reefs” to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP’s.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP’s 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP’s 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP’s 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

This RC excludes NWP use in Designated American Heritage Rivers, national Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. This list of exceptions was further refined downward based on the uniqueness of the island habitats that make up the entire POH AOR, which puts more importance on protecting these types of waters/areas. We have maintained this as RC 1 (Exclusions), sub-item 3 (American Heritage Rivers (Hanalei River), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas). This RC is applicable to this NWP as it will ensure impacts due to work proposed under this NWP will be avoided in these areas.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWPs require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWPs have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWPs. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWPs in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN)) and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas," to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect

the actual purpose of the RC and adding subsection “c” to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA’s and DOH’s recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 5 (Site Identification). This RC is applicable to this NWP as it will ensure impacts due to mooring systems result in minimal impacts to the aquatic environment.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to

address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

No waters were excluded from the use of NWP 35.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, all NWPs will require submittals of a PCN to POH.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under NWP 35 have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

In the POH, the climate and island topography limits the amount and extent of special aquatic sites that occur throughout the region. Many watersheds within the POH are relatively small and steep, which tend to create high peak discharges and velocities in storm events. Therefore, because of the small size of these watersheds relative to other regions of the U.S., acreage and linear length thresholds lower than the national standard are appropriate and necessary to ensure the NWPs verified in the POH region do not result in more than minimal individual or cumulative adverse effects to the aquatic resources of the region.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent usage of NWP 35 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect*

determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits the use of NWPs to authorize activities if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES is not specific to the NWPs, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an "Effect" determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWPs.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect* or *May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs prohibit projects if it is determined that it may affect properties, listed or eligible for listing, in the NRHP until the requirements of Section 106 of the NHPA have been satisfied. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson of Daughters of Hawaii did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an "Effect" determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the

requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs prohibit projects if it is determined that it may affect properties, listed or eligible for listing, in the NRHP until the requirements of Section 106 of the NHPA have been satisfied. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

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

(b) Economics: Same as discussed in the national decision document.

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

(d) General environmental concerns: Impacts to the surrounding marine environment are anticipated to be minimal as the NW authorizes maintenance dredging only in existing marinas

where the aquatic environment has already sustained impacts, of which those impacts have previously been evaluated and authorized. While the maintenance dredging may not increase the previously authorized existing marina depth or footprint, it is possible for individual corals, coral reefs, or sea grass beds to have established in the interim period between the original or last dredging occurrence and the present time; accordingly, these impacts will have to be examined to ensure that the impacts authorized under this NW do not exceed the minimal impact threshold.

(e) Wetlands: Same as discussed in the national decision document.

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

(g) Fish and wildlife values: This NWP authorizes activities in navigable waters of the United States, including marine, estuarine, and riverine waters, which provide habitat to many species of fish and wildlife. Activities authorized by this NWP may alter the habitat characteristics of open water, decreasing the quantity and quality of fish habitat. Open waters provide habitat for fish and other aquatic organisms. The district engineer may require compensatory mitigation to restore, enhance, establish, and/or preserve aquatic habitats to offset losses of waters of the United States. Any required compensatory mitigation will provide fish habitat values.

General condition 2 will reduce the adverse effects to fish and other aquatic species by prohibiting activities that substantially disrupt the movements of indigenous aquatic species, unless the primary purpose of the activity is to impound water. Compliance with general conditions 3 and 5 will ensure that the authorized work has minimal adverse effects on spawning areas and shellfish beds, respectively. The authorized work cannot have more than minimal adverse effects on breeding areas for migratory birds, due to the requirements of general condition 4.

Compliance with the Bald and Golden Eagle Protection Act (16 U.S.C. 668(a)-(d)), the Migratory Bird Treaty Act (16 U.S.C. 703; 16 U.S.C. 712), and the Marine Mammal Protection Act (16 U.S.C. 1361 et seq.), including any requirements to obtain take permits, is the responsibility of the project proponent for a particular NWP activity.

Pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, the Honolulu District will consult with NOAA NMFS HCD on proposed NWP activities that may adversely affect essential fish habitat. The Coral Reef Advisory in the RC document may help increase awareness of coral reefs, and RC 2, which requires a PCN for all activities, and the exclusion under RC 1 will both help to ensure that activities authorized by this NWP will result in no more than minimal adverse effects on coral reef habitat.

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

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

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

(k) Navigation: Same as discussed in the national decision document.

- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI. The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has not authorized maintenance dredging of existing marinas using the NWP considered in this document during the past five years. Based on the average size of marina basins located around the state of Hawaii, the POH estimates that this NWP may be used approximately two times per year, anticipating approximately 100 acres (assuming an average of 10 acres per maintenance dredging of an existing marina) of impact to waters of the United States in the next five years. For these unavoidable impacts to waters of the U.S., review under this NWP on a case-by-case basis will determine whether or not compensatory mitigation will be required. We have no scientific evidence, anecdotal or empirical, to suggest the temporary impact to 100 acres of waters of the U.S. will result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii

Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to be infrequent and therefore, the cumulative effects to the aquatic environment will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 35

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

- NWP 21 - Surface Coal Mining Activities
- NWP 29 - Residential Developments
- NWP 34 - Cranberry Production Activities
- NWP 39 - Commercial and Institutional Developments
- NWP 42 - Recreational Activities
- NWP 44 - Mining Activities
- NWP 49 - Coal Remining Activities
- NWP 50 - Underground Coal Mining Activities
- NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 13 – Bank Stabilization
- NWP 14 – Linear Transportation Projects
- NWP 40 – Agricultural Activities
- NWP 41 – Reshaping Existing Drainage Ditches
- NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWP's may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWP's may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWP's may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWP's may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures

NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 25 - Structural Discharges
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 30, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWP's within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation or, under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

(1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.

(2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.

(3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP's: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army

Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.

b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.

c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.

- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.
- i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.
- j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.
- k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.).

Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting “Impaired Waters” as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill’s acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes “...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste.” The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 WQCs) indicated by personal communication that it was the Department’s intent to issue a blanket certification for approximately 7 NWP’s, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP’s. While no blanket WQC was issued for Hawaii for the 2007 NWP’s, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP’s, which we found to be reasonable and not result in a denial of any one or number of NWP’s for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWPs in Guam, providing blanket certification for NWPs 5, 6, 15, 20, 25, 30, 32, 36, 37, 38, and conditional certification for NWPs 4, 22, and 27. American Samoa and CNMI were undecided as to final certification of the NWPs at the time of this writing. As is the case with any DA authorization, verification of a NWP does not obviate the need for any other Federal, State or local authorization.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWPs 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination. The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWPs at this time. For the above reasons, the NWPs are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI. As is the case with any DA authorization, verification of a NWP does not obviate the need for any other Federal, State or local authorization.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

Section 10 Only NWP

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 3 (Maintenance)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 3, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 3 – Acreage Limitation

We originally proposed grouping all areas of POH AOR together under the same acreage limits. This would increase acreage limits in Guam, CNMI, and American Samoa to 1/3rd acre from 1/10th acre.

FWS questioned whether the proposed increase in allowable maximum losses was based on any cumulative impacts within POH. It believes the proposed increase could result in substantial and unacceptable impacts to aquatic resources of national importance and would continue to add to the cumulative losses throughout the Pacific Islands.

NOAA and EPA requested reinstatement of the previous 1/10th acre limit which was based on the small scale and uniqueness of aquatic resources in American Samoa and the Marianas archipelago. DOH supports lowering the allowable acreage of fill in Hawaii to 1/10th acre to make Hawaii consistent with Guam, CNMI, and American Samoa.

All areas within the POH AOR have very limited special aquatic sites, and reducing the area of fill authorized under the NWPs will minimize impacts to those sites. A review of POH records indicates that the lower acreage will not result in significantly higher workload for the Corps and will improve consistency across the POH AOR. The 1/10th acre limit is adopted.

We removed NWPs 29, 39, and 42, as these are on the list of NWPs prohibited in the POH AOR, and have added NWP 51 because we agree that activities authorized by this new NWP could involve the discharge of dredged or fill material in waters of the U.S. and, accordingly, should fall under the acreage limitation or be reviewed through the more in-depth procedure of an Individual Permit.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.5 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters

subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.6 Proposed Regional Condition 6 – Road Crossings

As discussed in 2.2.1 above, RC 6 was created to incorporate the “Use of Embedded or Bottomless Arch Culverts” advisory found in the February 18, 2011 PN and to better inform the public as to its applicability to many NWPs. The resource agencies’ comments were reasonable for minimizing impacts to the aquatic environment and are enforceable. Accordingly, they were included in the RC. Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

3.1.1 National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas

RC 1 restricts this NWP from use in National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas because they have particular environmental or ecological significance. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.2 Anchialine pools, montane bogs, natural freshwater lakes and saline lakes

Due to the uniqueness and rareness of these types of habitats in POH AOR, RC 1 restricts this NWP from use in anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.3 Mangroves and Sea and Freshwater Caves

RC 1 restricts this NWP from being used to authorize activities in mangroves or sea or freshwater caves in Guam, American Samoa (AS), and the Commonwealth of the Northern Mariana Islands (CNMI). Mangroves provide extremely important functions for natural shoreline protection and aquatic species nursery grounds, and sea and freshwater caves are considered unique habitats. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If

the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWPs, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWPs.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other

available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations (NHOs)

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff’s time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what

types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to “flag” applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.

- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest

portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

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

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

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

(d) Current patterns and water circulation: Same as discussed in the national decision document.

(e) Normal water level fluctuations: Same as discussed in the national decision document.

(f) Salinity gradients: Same as discussed in the national decision document.

(g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic

environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require

the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWP for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

- (6) Riffle and pool complexes: Same as discussed in the national decision document.
- (k) Municipal and private water supplies: Same as discussed in the national decision document.
- (l) Recreational and commercial fisheries: Same as discussed in the national decision document.
- (m) Water-related recreation: Same as discussed in the national decision document.
- (n) Aesthetics: Same as discussed in the national decision document.
- (o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized 92 actions using the NWP considered in this document during the past five years, with recorded impacts of 0.2 acres to waters of the U.S. from 25 actions in FY 2010. POH estimates that this NWP may be used approximately 30 times per year, anticipating approximately 1.0 acres (using the 0.2 acre per year figure from FY 2010) of impact to waters of the United States in the next five years. For these unavoidable impacts to waters of the U.S., review under this NWP on a case-by-case basis will determine whether compensatory mitigation will be required. We have no scientific evidence, anecdotal or empirical, to suggest the temporary impact to 1.0 acres of waters of the U.S. will result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 3

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

- NWP 21 - Surface Coal Mining Activities
- NWP 29 - Residential Developments
- NWP 34 - Cranberry Production Activities
- NWP 39 - Commercial and Institutional Developments
- NWP 42 - Recreational Activities
- NWP 44 - Mining Activities
- NWP 49 - Coal Remining Activities
- NWP 50 - Underground Coal Mining Activities
- NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 13 – Bank Stabilization
- NWP 14 – Linear Transportation Projects
- NWP 40 – Agricultural Activities
- NWP 41 – Reshaping Existing Drainage Ditches
- NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit

natural resources in the designated area, the following NWP's may be used to authorize activities within these areas:

- NWP 3 – Maintenance
- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 12 – Utility Line Activities
- NWP 14 – Linear Transportation Projects
- NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
- NWP 30 – Moist Soil Management for Wildlife
- NWP 37 – Emergency Watershed Protection and Rehabilitation
- NWP 40 – Agricultural Activities
- NWP 41 – Reshaping Existing Drainage Ditches
- NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWP's may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

- NWP 3 – Maintenance
- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 12 – Utility Line Activities
- NWP 13 – Bank Stabilization
- NWP 14 – Linear Transportation Projects
- NWP 18 – Minor Discharges
- NWP 19 – Minor Dredging
- NWP 33 – Temporary Construction, Access, and Dewatering
- NWP 40 – Agricultural Activities
- NWP 41 – Reshaping Existing Drainage Ditches
- NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWP's may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

- NWP 3 - Maintenance
- NWP 7 - Outfall Structures and Associated Intake Structures
- NWP 12 - Utility Line Activities
- NWP 13 - Bank Stabilization
- NWP 14 - Linear Transportation Projects
- NWP 18 - Minor Discharges
- NWP 19 - Minor Dredging
- NWP 33 - Temporary Construction, Access, and Dewatering

NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 25 - Structural Discharges
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional

circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

(1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.

(2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.

(3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

- a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.
- b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.
- c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).
- d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).
- e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected

and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.

f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.

g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.

h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed

within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 3 – Acreage Limitation

For any discharge of dredged or fill material in a special aquatic site, including wetlands, authorized by NWP 3, 7, 40, 41, 43, 45, 46, or 51, or a combination of any of these NWPs, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/10-acre.

10.4 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

10.5 Regional Condition 6 – Road Crossings

For any activity authorized under NWP 3, 14, 27, 37, 40, 41, or 45, use of embedded or bottomless arch culverts is required when practicable, especially where frequent culvert maintenance or replacement is needed. Culverts must maintain the original and natural full bank capacity (cross-sectional volume) of the channel.

If a bottomless culvert cannot be used, a rock apron with an appropriate slope (determined on a site or project specific basis), or other appropriate measures must be incorporated to prevent perching of the culvert or scouring that could obstruct up- and downstream native stream species

migration. To preserve a natural stream bed, bridge designs that span the stream or river, including pier or pile supported spans, are encouraged.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWP's, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP's. While no blanket WQC was issued for Hawaii for the 2007 NWP's, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP's, which we found to be reasonable and not result in a denial of any one or number of NWP's for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQC's. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. Accordingly, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 4
(Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 4, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management Practices (BMPs)”. It also contained the “Definition of Coral Reefs”. Our February 18, 2011 PN proposed keeping these two advisories and eliminating the “Definition of Coral Reefs”.

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the “Use of Embedded or Bottomless Arch Culverts” advisory into it as the advisory was specific to only certain NWP and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWPs. We also incorporated the resource agencies’ comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for “Site-Specific Best Management Practices (BMPs)” and a Regional Condition for “Standard Best Management Practices” and have combined the two into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the “Definition of Coral Reefs” to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWPs.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWPs 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWPs 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWPs 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these

categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we

have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN)) and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWP's and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could

result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will

ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

No waters were excluded from the use of NWP 4.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.2 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 4 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWP, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWP.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be

notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations (NHOs)

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and

enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.

- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection

and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if

necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 21 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 22 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP has had minimal use over the past five years with no impacts to wetlands, it is expected that these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as

storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District Engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District Engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized four (4) actions using the NWP considered in this document during the past five years, with recorded impacts of 1.2 acres to waters of the U.S. POH estimates that this NWP may be used approximately one (1) time per year, anticipating approximately 1.0 acre of impact to waters of the United States in the next five years. For these unavoidable impacts to waters of the U.S., review under this NWP on a case-by-case basis will determine whether compensatory mitigation will be required. We have no scientific evidence, anecdotal or empirical, to suggest the temporary impact to 1.0 acre of waters of the U.S. will result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 4

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

NWP 21 - Surface Coal Mining Activities
NWP 29 - Residential Developments
NWP 34 - Cranberry Production Activities
NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities

NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWP's may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures

NWP 12 - Utility Line Activities

NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges

NWP 25 - Structural Discharges

NWP 40 - Agricultural Activities

NWP 41 - Reshaping Existing Drainage Ditches

NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWP's in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWP's within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation or, under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the

Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.

h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration

techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which

generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these documents were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWPs, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWPs. While no blanket WQC was issued for Hawaii for the 2007 NWPs, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWPs, which we found to be reasonable and not result in a denial of any one or number of NWPs for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWPs in Guam, providing blanket certification for NWPs 5, 6, 15, 20, 25, 30, 32, 36, 37, 38, and conditional certification for NWPs 4, 22, and 27.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination. The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. Accordingly, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 21, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 5
(Scientific Measurement Devices)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 5, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management Practices (BMPs)”. It also contained the “Definition of Coral Reefs”. Our February 18, 2011 PN proposed keeping these two advisories and eliminating the “Definition of Coral Reefs”.

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the “Use of Embedded or Bottomless Arch Culverts” advisory into it as the advisory was specific to only certain NWPs and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWPs. We also incorporated the resource agencies’ comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for “Site-Specific Best Management Practices (BMPs)” and a Regional Condition for “Standard Best Management Practices” and have combined the two into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the “Definition of Coral Reefs” to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWPs.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWPs 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWPs 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWPs 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these

categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we

have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN)) and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWP's and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could

result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will

ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

No waters were excluded from the use of NWP 5.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.2 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 5 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the above SOP is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWP, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWP.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be

notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and

enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.

- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection

and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if

necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWP in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP has had minimal use over the past five years with no impacts to wetlands, it is expected that these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as

storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District Engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District Engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized 29 actions using the NWP considered in this document during the past five years, with recorded impacts of 0.4 acres to waters of the U.S. (not wetlands). The lion's share of the authorizations has been for scientific buoys. POH estimates that this NWP may be used approximately 10 times per year, anticipating approximately 12.0 acre of impact to waters of the United States in the next five years. For these unavoidable impacts to waters of the U.S., review under this NWP on a case-by-case basis will determine whether compensatory mitigation will be required. We have no scientific evidence, anecdotal or empirical, to suggest the temporary impact to 1.0 acre of waters of the U.S. will result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 5

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

NWP 21 - Surface Coal Mining Activities
NWP 29 - Residential Developments
NWP 34 - Cranberry Production Activities
NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities

NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWP's may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures

NWP 12 - Utility Line Activities

NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges

NWP 25 - Structural Discharges

NWP 40 - Agricultural Activities

NWP 41 - Reshaping Existing Drainage Ditches

NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWP's in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWP's within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the

Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.

h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration

techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which

generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWPs, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWPs. While no blanket WQC was issued for Hawaii for the 2007 NWPs, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWPs, which we found to be reasonable and not result in a denial of any one or number of NWPs for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWPs in Guam, providing blanket certification for NWPs 5, 6, 15, 20, 25, 30, 32, 36, 37, 38, and conditional certification for NWPs 4, 22, and 27.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination. The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. Accordingly, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 6
(Survey Activities)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 6, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management Practices (BMPs)”. It also contained the “Definition of Coral Reefs”. Our February 18, 2011 PN proposed keeping these two advisories and eliminating the “Definition of Coral Reefs”.

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the “Use of Embedded or Bottomless Arch Culverts” advisory into it as the advisory was specific to only certain NWP and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWPs. We also incorporated the resource agencies’ comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for “Site-Specific Best Management Practices (BMPs)” and a Regional Condition for “Standard Best Management Practices” and have combined the two into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the “Definition of Coral Reefs” to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWPs.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWPs 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWPs 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWPs 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these

categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we

have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN)) and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWP's and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could

result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will

ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

No waters were excluded from the use of NWP 6.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.2 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWP, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWP.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be

notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.

- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects

and linear transportation projects will likely increase in the next five years. With this, we may see an increase in survey activity requests.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of

populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWP in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as

storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized 19 actions using the NWP considered in this document during the past five years, with recorded impacts of 0.008 acres to waters of the U.S. (not wetlands). POH estimates that this NWP may be used approximately 10 times per year, anticipating less than 1.0 acre of impact to waters of the United States in the next five years. For these unavoidable impacts to waters of the U.S., review under this NWP on a case-by-case basis will determine whether compensatory mitigation will be required. We have no scientific evidence, anecdotal or empirical, to suggest the temporary impact to 1.0 acre of waters of the U.S. will result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed, required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 6

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

NWP 21 - Surface Coal Mining Activities
NWP 29 - Residential Developments
NWP 34 - Cranberry Production Activities
NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities

NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWP's may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures

NWP 12 - Utility Line Activities

NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges

NWP 25 - Structural Discharges

NWP 40 - Agricultural Activities

NWP 41 - Reshaping Existing Drainage Ditches

NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWP's in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWP's within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation or, under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the

Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.

h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration

techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirement (Projects in the State of Hawaii Only)

a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which

generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWPs, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWPs. While no blanket WQC was issued for Hawaii for the 2007 NWPs, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWPs, which we found to be reasonable and not result in a denial of any one or number of NWPs for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWPs in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this

NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWPs at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWPs 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWPs at this time. Accordingly, the NWPs are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 7
(Outfall Structures and Associated Intake Structures)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 7, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management Practices (BMPs)”. It also contained the “Definition of Coral Reefs”. Our February 18, 2011 PN proposed keeping these two advisories and eliminating the “Definition of Coral Reefs”.

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the “Use of Embedded or Bottomless Arch Culverts” advisory into it as the advisory was specific to only certain NWP and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWPs. We also incorporated the resource agencies’ comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for “Site-Specific Best Management Practices (BMPs)” and a Regional Condition for “Standard Best Management Practices” and have combined the two into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the “Definition of Coral Reefs” to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWPs.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWPs 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWPs 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWPs 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these

categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWPs 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWPs 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWPs 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWPs 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWPs in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWPs require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWPs have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we

have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN)) and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWP's and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could

result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will

ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 3 – Acreage Limitation

We originally proposed grouping all areas of POH AOR together under the same acreage limits. This would increase acreage limits in Guam, CNMI, and American Samoa to 1/3rd acre from 1/10th acre.

FWS questioned whether the proposed increase in allowable maximum losses was based on any cumulative impacts within POH. It believes the proposed increase could result in substantial and unacceptable impacts to aquatic resources of national importance and would continue to add to the cumulative losses throughout the Pacific Islands.

NOAA and EPA requested reinstatement of the previous 1/10th acre limit which was based on the small scale and uniqueness of aquatic resources in American Samoa and the Marianas archipelago. DOH supports lowering the allowable acreage of fill in Hawaii to 1/10th acre to make Hawaii consistent with Guam, CNMI, and American Samoa.

All areas within the POH AOR have very limited special aquatic sites, and reducing the area of fill authorized under the NWPs will minimize impacts to those sites. A review of POH records indicates that the lower acreage will not result in significantly higher workload for the Corps and will improve consistency across the POH AOR. The 1/10th acre limit is adopted.

We removed NWPs 29, 39, and 42, as these are on the list of NWPs prohibited in the POH AOR, and have added NWP 51 because we agree that activities authorized by this new NWP could involve the discharge of dredged or fill material in waters of the U.S. and, accordingly, should fall under the acreage limitation or be reviewed through the more in-depth procedure of an Individual Permit.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.5 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

3.1.1 Kihei Wetlands

Due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts, RC 1 restricts this NWP from being used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west. Instead, when taking place in this area, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.2 National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas

RC 1 restricts this NWP from use in National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas because they have particular environmental or ecological significance. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.3 Anchialine pools, montane bogs, natural freshwater lakes and saline lakes

Due to the uniqueness and rareness of these types of habitats in POH AOR, RC 1 restricts this NWP from use in anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.4 Mangroves and Sea and Freshwater Caves

RC 1 restricts this NWP from being used to authorize activities in mangroves or sea or freshwater caves in Guam, American Samoa (AS), and the Commonwealth of the Northern Mariana Islands (CNMI). Mangroves provide extremely important functions for natural shoreline protection and aquatic species nursery grounds, and sea and freshwater caves are considered unique habitats. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.5 Stream Modification

RC 1 restricts this NWP from being used within POH to authorize permanent stream channelization or construction of dams that impound waters of the United States.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to

our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination.

The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWPs, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an "Effect" determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWPs.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect* or *May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an "Effect" determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the

requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.

- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by

USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of

standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

- (h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.
- (i) Other wildlife: Same as discussed in the national decision document.
- (j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized five (5) actions using the NWP considered in this document during the past five years, with recorded impacts of 0.05 acres to waters of the U.S. from 25 actions in FY 2010. POH estimates that this NWP may be used approximately 5 times per year, anticipating approximately 0.25 acres of impact to waters of the United States in the next five years. For these unavoidable impacts to waters of the U.S., review under this NWP on a case-by-case basis will determine whether compensatory mitigation will be required. We have no scientific evidence, anecdotal or empirical, to suggest the temporary impact to 0.25 acres of waters of the U.S. will result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and

mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 7

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

- NWP 21 - Surface Coal Mining Activities
- NWP 29 - Residential Developments
- NWP 34 - Cranberry Production Activities
- NWP 39 - Commercial and Institutional Developments
- NWP 42 - Recreational Activities
- NWP 44 - Mining Activities
- NWP 49 - Coal Remining Activities
- NWP 50 - Underground Coal Mining Activities
- NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 13 – Bank Stabilization
- NWP 14 – Linear Transportation Projects

NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI)

within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

- NWP 3 - Maintenance
- NWP 7 - Outfall Structures and Associated Intake Structures
- NWP 12 - Utility Line Activities
- NWP 13 - Bank Stabilization
- NWP 14 - Linear Transportation Projects
- NWP 18 - Minor Discharges
- NWP 19 - Minor Dredging
- NWP 33 - Temporary Construction, Access, and Dewatering
- NWP 40 - Agricultural Activities
- NWP 41 - Reshaping Existing Drainage Ditches
- NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

- NWP 7 - Outfall Structures and Associated Intake Structures
- NWP 12 - Utility Line Activities
- NWP 14 - Linear Transportation Projects
- NWP 18 - Minor Discharges
- NWP 25 - Structural Discharges
- NWP 40 - Agricultural Activities
- NWP 41 - Reshaping Existing Drainage Ditches
- NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7

days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWP's within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP's: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution

Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when

protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.

b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.

- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.
- i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.
- j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired

waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting “Impaired Waters” as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill’s acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes “...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste.” The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 3 – Acreage Limitation

For any discharge of dredged or fill material in a special aquatic site, including wetlands, authorized by NWP 3, 7, 40, 41, 43, 45, 46, or 51, or a combination of any of these NWPs, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/10-acre.

10.4 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these documents were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWP's, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP's. While no blanket WQC was issued for Hawaii for the 2007 NWP's, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP's, which we found to be reasonable and not result in a denial of any one or number of NWP's for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the

NWPs at this time. Accordingly, the NWPs are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 12 (Utility Line Activities)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 12, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 4 – Length Limitation

This was originally called RC 4 (Length Limitation) in the February 18, 2011 PN and we originally proposed a statement that the 200 linear foot limit could be exceeded if the district engineer waives this limit by making a written determination that any discharges will result in minimal impacts to the aquatic environment.

NOAA, EPA and FWS recommended (in subsequent face-to-face meetings) that any waiver be supported by baseline stream data with the appropriate analysis of impacts to the aquatic environment. DOH requested keeping the original language without the possibility of a waiver.

A requirement to provide baseline stream data would put an unnecessary burden on applicants beyond that intended for submittal of PCNs for verification under the NWPs. However, we have no data or other information indicating the 200 linear foot limit has unduly restricted use of the NWPs; therefore, we will not include the waiver provision in this RC.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.5 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item. FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. Verifications for this NWP, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent

loss of aquatic habitat. Therefore, activities carried out under this NWP may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under this NWP. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under this NWP if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

3.1.1 National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas

RC 1 restricts this NWP from use in National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas because they have particular environmental or ecological significance. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.2 Anchialine pools, montane bogs, natural freshwater lakes and saline lakes

Due to the uniqueness and rareness of these types of habitats in POH AOR, RC 1 restricts this NWP from use in anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.3 Mangroves and Sea and Freshwater Caves

RC 1 restricts this NWP from being used to authorize activities in mangroves or sea or freshwater caves in Guam, American Samoa (AS), and the Commonwealth of the Northern Mariana Islands (CNMI). Mangroves provide extremely important functions for natural shoreline protection and aquatic species nursery grounds, and sea and freshwater caves are considered unique habitats. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.4 Stream Modification

RC 1 restricts this NWP from being used within POH to authorize permanent stream channelization or construction of dams that impound waters of the United States.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWP, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWPs.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be

notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

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

(b) Economics: Same as discussed in the national decision document.

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

(d) General environmental concerns: This NWP authorizes activities in navigable waters of the United States, including marine, estuarine, and riverine waters, which provide habitat to many species of fish and wildlife. Activities authorized by this NWP may alter the habitat characteristics of open water, decreasing the quantity and quality of fish habitat. Open waters provide habitat for fish and other aquatic organisms. Compensatory mitigation may be required by district engineers to restore, enhance, establish, and/or preserve aquatic habitats to offset losses of waters of the United States. These methods of compensatory mitigation will provide fish habitat values.

General condition 2 will reduce the adverse effects to fish and other aquatic species by prohibiting activities that substantially disrupt the movements of indigenous aquatic species, unless the primary purpose of the activity is to impound water. Compliance with general conditions 3 and 5 will ensure that the authorized work has minimal adverse effects on spawning areas and shellfish beds, respectively. The authorized work cannot have more than minimal adverse effects on breeding areas for migratory birds, due to the requirements of general condition 4.

Compliance with the Bald and Golden Eagle Protection Act (16 U.S.C. 668(a)-(d)), the Migratory Bird Treaty Act (16 U.S.C. 703; 16 U.S.C. 712), and the Marine Mammal Protection Act (16 U.S.C. 1361 et seq.), including any requirements to obtain take permits, is the responsibility of the project proponent for a particular NWP activity.

Consultation pursuant to the essential fish habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act will occur as necessary for proposed NWP activities that may adversely affect essential fish habitat. The Coral Reef Advisory in the RC document may help increase awareness of coral reefs and RC 2 which requires a PCN for all activities, as well as the exclusion under RC 1 will both help to ensure that activities authorized by this NWP will result in minimal adverse effects on coral reef habitat.

(e) Wetlands: Same as discussed in the national decision document.

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

(g) Fish and wildlife values: This NWP authorizes certain utility line activities in all waters of the United States. Discharges of dredged or fill material into waters of the United States for the construction of utility line substations is limited to non-tidal waters, excluding non-tidal waters adjacent to tidal waters. Waters of the United States provide habitat to many species of fish and wildlife. Activities authorized by this NWP may alter the habitat characteristics of streams, wetlands, and other waters of the United States, decreasing the quantity and quality of fish and wildlife habitat. The construction of utility line right-of-ways may fragment existing habitat and increase the amount of edge habitat in the area, causing changes in local species composition. Wetland, riparian, and estuarine vegetation provides food and habitat for many species, including foraging areas, resting areas, corridors for wildlife movement, and nesting and breeding grounds. Open waters provide habitat for fish and other aquatic organisms. Fish and other motile animals will avoid the project site during construction and maintenance. Woody riparian vegetation shades streams, which reduces water temperature fluctuations and provides habitat for fish and other aquatic animals. Riparian and estuarine vegetation provides organic matter that is consumed by fish and aquatic invertebrates. Woody riparian vegetation creates habitat diversity in streams when trees and large shrubs fall into the channel, forming snags that provide habitat and shade for fish. The morphology of a stream channel may be altered by activities authorized by this NWP, which can affect fish populations. However, pre-construction notification is required for certain activities authorized by this NWP, which provides district engineers with opportunities to review those activities, assess potential impacts on fish and wildlife values, and ensure that the authorized work results in minimal adverse effects on the aquatic environment. Compensatory mitigation may be required by district engineers to restore, enhance, establish, and/or preserve wetlands and other aquatic habitats to offset losses of waters of the United States. The establishment and maintenance of riparian areas next to open and flowing waters may also be required as compensatory mitigation. These methods of compensatory mitigation will provide fish and wildlife habitat values.

General condition 2 will reduce adverse effects to fish and other aquatic species by prohibiting activities that substantially disrupt the necessary life cycle movements of indigenous aquatic species, unless the primary purpose of the activity is to impound water. Compliance with general conditions 3 and 5 will ensure that the authorized work has minimal adverse effects on spawning areas and shellfish beds, respectively. The authorized work cannot have more than minimal adverse effects on breeding areas for migratory birds, due to the requirements of general condition 4.

Compliance with the Bald and Golden Eagle Protection Act (16 U.S.C. 668(a)-(d)), the Migratory Bird Treaty Act (16 U.S.C. 703; 16 U.S.C. 712), and the Marine Mammal Protection Act (16 U.S.C. 1361 et seq.), including any requirements to obtain take permits, is the responsibility of the project proponent for a particular NWP activity.

Consultation pursuant to the essential fish habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act will occur as necessary for proposed NWP activities that

may adversely affect essential fish habitat. Consultation may occur on a case-by-case or programmatic basis. Division and district engineers can impose regional and special conditions to ensure that activities authorized by this NWP will result in minimal adverse effects on essential fish habitat. The Coral Reef Advisory in the RC document may help increase awareness of coral reefs and RC 2 which requires a PCN for all activities, as well as the exclusion under RC 1 will both help to ensure that activities authorized by this NWP will result in minimal adverse effects on coral reef habitat.

- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam

Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. Regional General Permits authorized 81 floating docks in Hawaii Kai Marina and repeated maintenance dredging of Pearl Harbor on the Island of Oahu. Letters of Permission authorized 100+ day-use mooring buoys in the state of Hawaii and a handful of scientific measuring buoys throughout the POH AOR. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District

engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized 31 actions using the NWP considered in this document during the past five years, with recorded impacts ranging from 20 linear feet to 18,241 linear feet. The average of the recorded impacts is 1,721 linear feet and the mode is 100 linear feet; the average of 14 actions with impacts between 20 linear feet and 1,000 linear feet is 288'. POH estimates that this NWP may be used approximately 10 times per year, anticipating approximately 4.0 acres (using the 288 linear foot figure and an average trench width of 10') of

impact to waters of the United States in the next five years. To reiterate, it is anticipated that, with the increased population expected on Guam, requests for utility line projects will likely increase above previous trends. For these unavoidable impacts to waters of the U.S., review under this NWP on a case-by-case basis will determine whether compensatory mitigation will be required. We have no scientific evidence, anecdotal or empirical, to suggest the temporary impact to 4.0 acres of waters of the U.S. will result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 12

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

- NWP 21 - Surface Coal Mining Activities
- NWP 29 - Residential Developments
- NWP 34 - Cranberry Production Activities
- NWP 39 - Commercial and Institutional Developments
- NWP 42 - Recreational Activities
- NWP 44 - Mining Activities
- NWP 49 - Coal Remining Activities
- NWP 50 - Underground Coal Mining Activities

NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering

NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 25 - Structural Discharges
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation or, under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be

downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan

(HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue

verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 4 – Length Limitation

Any discharge of dredged or fill material in any stream bed, including intermittent and ephemeral streams, authorized by NWP 12, 13, 14, 40, 45, 46, or 51 may not exceed 200 linear feet.

10.4 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWPs, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWPs. While no blanket WQC was issued for Hawaii for the 2007 NWPs, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWPs, which we found to be reasonable and not result in a denial of any one or number of NWPs for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWPs in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. Accordingly, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 13 (Bank Stabilization)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 13, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 4 – Length Limitation

This was originally called RC 4 (Length Limitation) in the February 18, 2011 PN and we originally proposed a statement that the 200 linear foot limit could be exceeded if the district engineer waives this limit by making a written determination that any discharges will result in minimal impacts to the aquatic environment.

NOAA, EPA and FWS recommended (in subsequent face-to-face meetings) that any waiver be supported by baseline stream data with the appropriate analysis of impacts to the aquatic environment. DOH requested keeping the original language without the possibility of a waiver.

A requirement to provide baseline stream data would put an unnecessary burden on applicants beyond that intended for submittal of PCNs for verification under the NWPs. However, we have no data or other information indicating the 200 linear foot limit has unduly restricted use of the NWPs; therefore, we will not include the waiver provision in this RC.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.5 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing

waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.6 Proposed Regional Condition 7 – Bank Stabilization

This was originally labeled RC 5 (Bank Stabilization) in the February 18, 2011 PN. In the PN, POH proposed allowing the use of rigid structures if the district engineer made a written determination that such structures would be preferred for purposes of preventing sedimentation impacts to adjacent receiving waters.

We reworded this RC to clarify that it could be waived if the district engineer has made a written determination that the structure would not result in more than minimal impacts to the aquatic environment and downstream channel stability and would minimize sedimentation impacts to adjacent receiving waters.

NOAA, EPA and FWS recommended (in subsequent face-to-face meetings) that the waiver be supported by baseline stream data with the appropriate analysis of impacts to the aquatic environment. A requirement to provide baseline stream data would put an unnecessary burden on applicants beyond that intended for submittal of PCNs for verification under the NWPs. We believe the “appropriate analysis of impacts to the aquatic environment” falls within the best professional judgment of the POH Regulatory staff in determining if the minimal impacts threshold is exceeded. We will not include this baseline stream data requirement in the RC.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

3.1.1 Kihei Wetlands

Due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts, RC 1 restricts this NWP from being used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south,

Piilani Highway to the east, and extending to the Pacific Ocean to the west. Instead, when taking place in this area, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.2 Anchialine pools, montane bogs, natural freshwater lakes and saline lakes

Due to the uniqueness and rareness of these types of habitats in POH AOR, RC 1 restricts this NWP from use in anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.3 Mangroves and Sea and Freshwater Caves

RC 1 restricts this NWP from being used to authorize activities in mangroves or sea or freshwater caves in Guam, American Samoa (AS), and the Commonwealth of the Northern Mariana Islands (CNMI). Mangroves provide extremely important functions for natural shoreline protection and aquatic species nursery grounds, and sea and freshwater caves are considered unique habitats. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWPs, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an "Effect" determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWPs.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect* or *May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any

blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWP would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an "Effect" determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

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

(b) Economics: Same as discussed in the national decision document.

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

(d) General environmental concerns: Activities authorized by this NWP will affect general environmental concerns, such as water, air, noise, and land pollution. The authorized work will also affect the physical, chemical, and biological characteristics of the environment. The adverse effects of the activities authorized by this NWP on general environmental concerns will be minor. Adverse effects to the chemical composition of the aquatic environment will be

controlled by general condition 6, which states that the material used for construction must be free from toxic pollutants in toxic amounts.

Activities authorized by this NWP may alter the habitat characteristics of shoreline habitat, decreasing the quantity and quality of habitat for fish and other aquatic organisms. General condition 22 requires mitigation to minimize adverse effects to the aquatic environment through avoidance and minimization at the project site. Compensatory mitigation may be required by district engineers to ensure that the net adverse effects on the aquatic environment are minimal. It is important to note that the Corps scope of review is usually limited to impacts to aquatic resources. Specific environmental concerns are addressed in other sections of this document.

General condition 2 will reduce the adverse effects to fish and other aquatic species by prohibiting activities that substantially disrupt the movements of indigenous aquatic species, unless the primary purpose of the activity is to impound water. Compliance with general conditions 3 and 5 will ensure that the authorized work has minimal adverse effects on spawning areas and shellfish beds, respectively. The authorized work cannot have more than minimal adverse effects on breeding areas for migratory birds, due to the requirements of general condition 4.

Compliance with the Bald and Golden Eagle Protection Act (16 U.S.C. 668(a)-(d)), the Migratory Bird Treaty Act (16 U.S.C. 703; 16 U.S.C. 712), and the Marine Mammal Protection Act (16 U.S.C. 1361 et seq.), including any requirements to obtain take permits, is the responsibility of the project proponent for a particular NWP activity.

Consultation pursuant to the essential fish habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act will occur as necessary for proposed NWP activities that may adversely affect essential fish habitat. The Coral Reef Advisory in the RC document may help increase awareness of coral reefs and RC 2 which requires a PCN for all activities, as well as the exclusion under RC 1 will both help to ensure that activities authorized by this NWP will result in minimal adverse effects on coral reef habitat.

(e) Wetlands: Same as discussed in the national decision document.

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

(g) Fish and wildlife values: This NWP authorizes bank stabilization activities in all waters of the United States. Activities authorized by this NWP may alter the habitat characteristics of streams, wetlands, and other waters of the United States, decreasing the quantity and quality of fish and wildlife habitat. Wetland, riparian, and estuarine vegetation provides food and habitat for many species, including foraging areas, resting areas, corridors for wildlife movement, and nesting and breeding grounds. Open waters provide habitat for fish and other aquatic organisms. Fish and other motile animals will avoid the project site during construction and maintenance. Woody riparian vegetation shades streams, which reduces water temperature fluctuations and provides habitat for fish and other aquatic animals. Riparian and estuarine vegetation provides organic matter that is consumed by fish and aquatic invertebrates. Woody riparian vegetation creates habitat diversity in streams when trees and large shrubs fall into the channel, forming

snags that provide habitat and shade for fish. The morphology of a stream channel may be altered by activities authorized by this NWP, which can affect fish populations. However, pre-construction notification is required for certain activities authorized by this NWP, which provides district engineers with opportunities to review those activities, assess potential impacts on fish and wildlife values, and ensure that the authorized work results in minimal adverse effects on the aquatic environment. Compensatory mitigation may be required by district engineers to restore, enhance, establish, and/or preserve wetlands and other aquatic habitats to offset losses of waters of the United States. The establishment and maintenance of riparian areas next to open and flowing waters may also be required as compensatory mitigation. These methods of compensatory mitigation will provide fish and wildlife habitat values.

General condition 2 will reduce adverse effects to fish and other aquatic species by prohibiting activities that substantially disrupt the necessary life cycle movements of indigenous aquatic species, unless the primary purpose of the activity is to impound water. Compliance with general conditions 3 and 5 will ensure that the authorized work has minimal adverse effects on spawning areas and shellfish beds, respectively. The authorized work cannot have more than minimal adverse effects on breeding areas for migratory birds, due to the requirements of general condition 4.

Compliance with the Bald and Golden Eagle Protection Act (16 U.S.C. 668(a)-(d)), the Migratory Bird Treaty Act (16 U.S.C. 703; 16 U.S.C. 712), and the Marine Mammal Protection Act (16 U.S.C. 1361 et seq.), including any requirements to obtain take permits, is the responsibility of the project proponent for a particular NWP activity.

Consultation pursuant to the essential fish habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act will occur as necessary for proposed NWP activities that may adversely affect essential fish habitat. Consultation may occur on a case-by-case or programmatic basis. Division and district engineers can impose regional and special conditions to ensure that activities authorized by this NWP will result in minimal adverse effects on essential fish habitat. The Coral Reef Advisory in the RC document may help increase awareness of coral reefs and RC 2 which requires a PCN for all activities, as well as the exclusion under RC 1 will both help to ensure that activities authorized by this NWP will result in minimal adverse effects on coral reef habitat.

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

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

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

(k) Navigation: Same as discussed in the national decision document.

(l) Shore erosion and accretion: Same as discussed in the national decision document.

(m) Recreation: Same as discussed in the national decision document.

- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The

remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. Regional General Permits authorized 81 floating docks in Hawaii Kai Marina and repeated maintenance dredging of Pearl Harbor on the Island of Oahu. Letters of Permission authorized 100+ day-use mooring buoys in the state of Hawaii and a handful of scientific measuring buoys throughout the POH AOR. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.

(e) Normal water level fluctuations: Same as discussed in the national decision document.

(f) Salinity gradients: Same as discussed in the national decision document.

(g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

- (6) Riffle and pool complexes: Same as discussed in the national decision document.
- (k) Municipal and private water supplies: Same as discussed in the national decision document.
- (l) Recreational and commercial fisheries: Same as discussed in the national decision document.
- (m) Water-related recreation: Same as discussed in the national decision document.
- (n) Aesthetics: Same as discussed in the national decision document.
- (o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized 18 actions using the NWP considered in this document during the past five years, with recorded impacts to approximately 1,200 linear feet of stream bank, ranging from 57 to 450 linear feet with an average width of impact of five feet. POH estimates that this NWP may be used approximately 5 times per year, anticipating approximately 0.2 acres of impact to waters of the United States in the next five years. For these unavoidable impacts to waters of the U.S., review under this NWP on a case-by-case basis will determine whether compensatory mitigation will be required. We have no scientific evidence, anecdotal or empirical, to suggest the temporary impact to 0.2 acres of waters of the U.S. will result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects

to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 13

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

- NWP 21 - Surface Coal Mining Activities
- NWP 29 - Residential Developments
- NWP 34 - Cranberry Production Activities
- NWP 39 - Commercial and Institutional Developments
- NWP 42 - Recreational Activities
- NWP 44 - Mining Activities
- NWP 49 - Coal Remining Activities
- NWP 50 - Underground Coal Mining Activities
- NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 13 – Bank Stabilization
- NWP 14 – Linear Transportation Projects
- NWP 40 – Agricultural Activities
- NWP 41 – Reshaping Existing Drainage Ditches
- NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

- NWP 3 – Maintenance
- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 12 – Utility Line Activities

NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of

anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures

NWP 12 - Utility Line Activities

NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges

NWP 25 - Structural Discharges

NWP 40 - Agricultural Activities

NWP 41 - Reshaping Existing Drainage Ditches

NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered

Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-

256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands

etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.

g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.

h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:
<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

- a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.
- b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.
- c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:
 - (1) Identify the waterbody as an Impaired Water; and
 - (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.
- d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 4 – Length Limitation

Any discharge of dredged or fill material in any stream bed, including intermittent and ephemeral streams, authorized by NWP 12, 13, 14, 40, 45, 46, or 51 may not exceed 200 linear feet.

10.4 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

10.5 Regional Condition 7 – Bank Stabilization

For NWPs 13 (Bank Stabilization), 14 (Linear Transportation Projects), 27 (Aquatic Habitat Restoration, Establishment, and Enhancement Activities), and 45 (Repair of Uplands Damaged by Discrete Events), rigid structures such as pre-cast concrete, concrete rubble masonry, and cast-in-place structures may not be used for bank stabilization unless the district engineer waives this exclusion by making a written determination concluding that the structures will result in minimal adverse effects to the aquatic environment and downstream channel stability and will minimize sedimentation impacts to adjacent receiving waters.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of

Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWP's, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP's. While no blanket WQC was issued for Hawaii for the 2007 NWP's, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP's, which we found to be reasonable and not result in a denial of any one or number of NWP's for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQC's. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam, providing blanket certification for NWP's 5, 6, 15, 20, 25, 30, 32, 36, 37, 38, and conditional certification for NWP's 4, 22, and 27. American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing. As is the case with any DA authorization, verification of a NWP does not obviate the need for any other Federal, State or local authorization.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination. The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. For the above reasons, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI. As is the case with any DA authorization, verification of a NWP does not obviate the need for any other Federal, State or local authorization.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the

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

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

13.0 Final Determination

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

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 14 (Linear Transportation Projects)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 14, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011 issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 4 – Length Limitation

This was originally called RC 4 (Length Limitation) in the February 18, 2011 PN and we originally proposed a statement that the 200 linear foot limit could be exceeded if the district engineer waives this limit by making a written determination that any discharges will result in minimal impacts to the aquatic environment.

NOAA, EPA and FWS recommended (in subsequent face-to-face meetings) that any waiver be supported by baseline stream data with the appropriate analysis of impacts to the aquatic environment. DOH requested keeping the original language without the possibility of a waiver.

A requirement to provide baseline stream data would put an unnecessary burden on applicants beyond that intended for submittal of PCNs for verification under the NWPs. However, we have no data or other information indicating the 200 linear foot limit has unduly restricted use of the NWPs; therefore, we will not include the waiver provision in this RC.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.5 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing

waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.6 Proposed Regional Condition 6 – Road Crossings

As discussed in 2.2.1 above, RC 6 was created to incorporate the “Use of Embedded or Bottomless Arch Culverts” advisory found in the February 18, 2011 PN and to better inform the public as to its applicability to many NWPs. The resource agencies’ comments were reasonable for minimizing impacts to the aquatic environment and are enforceable. Accordingly, they were included in the RC. Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.7 Proposed Regional Condition 7 – Bank Stabilization

This was originally labeled RC 5 (Bank Stabilization) in the February 18, 2011 PN. In the PN, POH proposed allowing the use of rigid structures if the district engineer made a written determination that such structures would be preferred for purposes of preventing sedimentation impacts to adjacent receiving waters.

We reworded this RC to clarify that it could be waived if the district engineer has made a written determination that the structure would not result in more than minimal impacts to the aquatic environment and downstream channel stability and would minimize sedimentation impacts to adjacent receiving waters.

NOAA, EPA and FWS recommended (in subsequent face-to-face meetings) that the waiver be supported by baseline stream data with the appropriate analysis of impacts to the aquatic environment. A requirement to provide baseline stream data would put an unnecessary burden on applicants beyond that intended for submittal of PCNs for verification under the NWPs. We believe the “appropriate analysis of impacts to the aquatic environment” falls within the best professional judgment of the POH Regulatory staff in determining if the minimal impacts threshold is exceeded. We will not include this baseline stream data requirement in the RC.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.8 Proposed Regional Condition 9 - Runways and Taxiways

This RC was originally labeled RC 7 (Runways and Taxiways) in the February 18, 2011 PN, and we did not propose any changes to this item.

This RC excludes the construction of runways and taxiways from NWP 14 authorization in tidal waters of the U.S. Because most of the islands in the POH AOR are so small, with development pressed into the plains along the shorelines, any runways and taxiways are likely to be constructed out in the marine environment and most likely impact coral reefs and other special aquatic sites.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

3.1.1 Kihei Wetlands

Due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts, RC 1 restricts this NWP from being used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west. Instead, when taking place in this area, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.2 National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas

RC 1 restricts this NWP from use in National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas because they have particular environmental or ecological significance. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.3 Anchialine pools, montane bogs, natural freshwater lakes and saline lakes

Due to the uniqueness and rareness of these types of habitats in POH AOR, RC 1 restricts this NWP from use in anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.4 Mangroves and Sea and Freshwater Caves

RC 1 restricts this NWP from being used to authorize activities in mangroves or sea or freshwater caves in Guam, American Samoa (AS), and the Commonwealth of the Northern Mariana Islands (CNMI). Mangroves provide extremely important functions for natural shoreline protection and aquatic species nursery grounds, and sea and freshwater caves are considered unique habitats. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.5 Stream Modification

RC 1 restricts this NWP from being used within POH to authorize permanent stream channelization or construction of dams that impound waters of the United States.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWP General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWP, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWP.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect

determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not

have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to “flag” applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a

review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

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

(b) Economics: Same as discussed in the national decision document.

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

(d) General environmental concerns: Activities authorized by this NWP will affect general environmental concerns, such as water, air, noise, and land pollution. The authorized work will also affect the physical, chemical, and biological characteristics of the environment. The adverse effects of the activities authorized by this NWP on general environmental concerns will be minor. Adverse effects to the chemical composition of the aquatic environment will be controlled by general condition 6, which states that the material used for construction must be free from toxic pollutants in toxic amounts.

Activities authorized by this NWP may alter the habitat characteristics of aquatic and terrestrial habitat, decreasing the quantity and quality of habitat for fish and other aquatic organisms. General condition 22 requires mitigation to minimize adverse effects to the aquatic environment through avoidance and minimization at the project site. Compensatory mitigation may be required by district engineers to ensure that the net adverse effects on the aquatic environment are minimal. It is important to note that the Corps scope of review is usually limited to impacts to aquatic resources. Specific environmental concerns are addressed in other sections of this document.

General condition 2 will reduce the adverse effects to fish and other aquatic species by prohibiting activities that substantially disrupt the movements of indigenous aquatic species,

unless the primary purpose of the activity is to impound water. Compliance with general conditions 3 and 5 will ensure that the authorized work has minimal adverse effects on spawning areas and shellfish beds, respectively. The authorized work cannot have more than minimal adverse effects on breeding areas for migratory birds, due to the requirements of general condition 4.

Compliance with the Bald and Golden Eagle Protection Act (16 U.S.C. 668(a)-(d)), the Migratory Bird Treaty Act (16 U.S.C. 703; 16 U.S.C. 712), and the Marine Mammal Protection Act (16 U.S.C. 1361 et seq.), including any requirements to obtain take permits, is the responsibility of the project proponent for a particular NWP activity.

Consultation pursuant to the essential fish habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act will occur as necessary for proposed NWP activities that may adversely affect essential fish habitat. The Coral Reef Advisory in the RC document may help increase awareness of coral reefs and RC 2 which requires a PCN for all activities, as well as the exclusion under RC 1 will both help to ensure that activities authorized by this NWP will result in minimal adverse effects on coral reef habitat.

(e) Wetlands: Same as discussed in the national decision document.

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

(g) Fish and wildlife values: This NWP authorizes linear transportation projects in all waters of the United States. Activities authorized by this NWP may alter the habitat characteristics of streams, wetlands, and other waters of the United States, decreasing the quantity and quality of fish and wildlife habitat. Wetland, riparian, and estuarine vegetation provides food and habitat for many species, including foraging areas, resting areas, corridors for wildlife movement, and nesting and breeding grounds. Open waters provide habitat for fish and other aquatic organisms. Fish and other motile animals will avoid the project site during construction and maintenance. Woody riparian vegetation shades streams, which reduces water temperature fluctuations and provides habitat for fish and other aquatic animals. Riparian and estuarine vegetation provides organic matter that is consumed by fish and aquatic invertebrates. Woody riparian vegetation creates habitat diversity in streams when trees and large shrubs fall into the channel, forming snags that provide habitat and shade for fish. The morphology of a stream channel may be altered by activities authorized by this NWP, which can affect fish populations. However, pre-construction notification is required for certain activities authorized by this NWP, which provides district engineers with opportunities to review those activities, assess potential impacts on fish and wildlife values, and ensure that the authorized work results in minimal adverse effects on the aquatic environment. Compensatory mitigation may be required by district engineers to restore, enhance, establish, and/or preserve wetlands and other aquatic habitats to offset losses of waters of the United States. The establishment and maintenance of riparian areas next to open and flowing waters may also be required as compensatory mitigation. These methods of compensatory mitigation will provide fish and wildlife habitat values.

General condition 2 will reduce adverse effects to fish and other aquatic species by prohibiting activities that substantially disrupt the necessary life cycle movements of indigenous aquatic species, unless the primary purpose of the activity is to impound water. Compliance with

general conditions 3 and 5 will ensure that the authorized work has minimal adverse effects on spawning areas and shellfish beds, respectively. The authorized work cannot have more than minimal adverse effects on breeding areas for migratory birds, due to the requirements of general condition 4.

Compliance with the Bald and Golden Eagle Protection Act (16 U.S.C. 668(a)-(d)), the Migratory Bird Treaty Act (16 U.S.C. 703; 16 U.S.C. 712), and the Marine Mammal Protection Act (16 U.S.C. 1361 et seq.), including any requirements to obtain take permits, is the responsibility of the project proponent for a particular NWP activity.

Consultation pursuant to the essential fish habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act will occur as necessary for proposed NWP activities that may adversely affect essential fish habitat. Consultation may occur on a case-by-case or programmatic basis. Division and district engineers can impose regional and special conditions to ensure that activities authorized by this NWP will result in minimal adverse effects on essential fish habitat. The Coral Reef Advisory in the RC document may help increase awareness of coral reefs and RC 2 which requires a PCN for all activities, as well as the exclusion under RC 1 will both help to ensure that activities authorized by this NWP will result in minimal adverse effects on coral reef habitat.

- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. Regional General Permits authorized 81 floating docks in Hawaii Kai Marina and repeated maintenance dredging of Pearl Harbor on the Island of Oahu. Letters of Permission authorized 100+ day-use mooring buoys in the state of Hawaii and a handful of scientific measuring buoys throughout the POH AOR. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical

habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform

chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized 26 actions using the NWP considered in this document during the past five years, with recorded impacts to approximately .64 acres. With the proposed military relocation on Guam, POH estimates that this NWP may be used approximately 10 times per year, anticipating approximately 1.5 acres of impact to waters of the United States in the next five years. For these unavoidable impacts to waters of the U.S., review under this NWP on a case-by-case basis will determine whether compensatory mitigation will be required. We have no scientific evidence, anecdotal or empirical, to suggest the temporary impact to 1.5 acres of waters of the U.S. will result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 14

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

NWP 21 - Surface Coal Mining Activities
NWP 29 - Residential Developments
NWP 34 - Cranberry Production Activities
NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities

NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWP's may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures

NWP 12 - Utility Line Activities

NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges

NWP 25 - Structural Discharges

NWP 40 - Agricultural Activities

NWP 41 - Reshaping Existing Drainage Ditches

NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWP's in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWP's within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the

Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.

h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration

techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

- a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All special conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification. The special conditions are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.
- b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.
- c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:
 - (1) Identify the waterbody as an Impaired Water; and
 - (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.
- d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which

generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 4 – Length Limitation

Any discharge of dredged or fill material in any stream bed, including intermittent and ephemeral streams, authorized by NWP 12, 13, 14, 40, 45, 46, or 51 may not exceed 200 linear feet.

10.4 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

10.5 Regional Condition 6 – Road Crossings

Use of embedded or bottomless arch culverts is required when practicable, especially where frequent culvert maintenance or replacement is needed, for any activity authorized under the following NWPs:

- NWP 3 - Maintenance
- NWP 14 - Linear Transportation Projects
- NWP 27 - Aquatic Habitat Restoration, Establishment, and Enhancement Activities
- NWP 37 - Emergency Watershed Protection and Rehabilitation
- NWP 40 - Agricultural Activities
- NWP 41 - Reshaping Existing Drainage Ditches
- NWP 45 - Repair of Uplands Damaged by Discrete Events

Culverts must maintain the original and natural full bank capacity (cross-sectional volume) of the channel. If a bottomless culvert cannot be used, a rock apron with an appropriate slope (determined on a site or project specific basis), or other appropriate measures must be incorporated to prevent perching of the culvert or scouring that could obstruct up- and downstream native stream species migration. To preserve a natural stream bed, bridge designs that span the stream or river, including pier or pile supported spans, are encouraged.

10.6 Regional Condition 7 – Bank Stabilization

Rigid structures such as pre-cast concrete, concrete rubble masonry, and cast-in-place structures may not be used for bank stabilization if authorized under the following NWP:

NWP 13 - Bank Stabilization

NWP 14 - Linear Transportation Projects

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

NWP 45 - Repair of Uplands Damaged by Discrete Events

This exclusion may be waived by the district engineer with a written determination concluding that the structures will result in minimal adverse effects to the aquatic environment and downstream channel stability and will minimize sedimentation impacts to adjacent receiving waters.

10.7 Regional Condition 9 - Runways and Taxiways.

NWP 14 (Linear Transportation Projects) may not be used to authorize runways or taxiways.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWPs, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWPs. While no blanket WQC was issued for Hawaii for the 2007 NWPs, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWPs, which we found to be reasonable and not result in a denial of any one or number of NWPs for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. Accordingly, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 15
(U.S. Coast Guard Approved Bridges)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 15, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

1.0 Background

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2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management Practices (BMPs)”. It also contained the “Definition of Coral Reefs”. Our February 18, 2011 PN proposed keeping these two advisories and eliminating the “Definition of Coral Reefs”.

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the “Use of Embedded or Bottomless Arch Culverts” advisory into it as the advisory was specific to only certain NWP and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWPs. We also incorporated the resource agencies’ comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for “Site-Specific Best Management Practices (BMPs)” and a Regional Condition for “Standard Best Management Practices” and have combined the two into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the “Definition of Coral Reefs” to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWPs.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWPs 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWPs 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given

the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWPs 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWPs due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWPs 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWPs 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWPs 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWPs 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWPs require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWPs have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWPs. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWPs in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN)) and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect

the actual purpose of the RC and adding subsection “c” to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA’s and DOH’s recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to

address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps

or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment .

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

3.1.1 National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas

RC 1 restricts this NWP from use in National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas because they have particular environmental or ecological significance. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.2 Anchialine pools, montane bogs, natural freshwater lakes and saline lakes

Due to the uniqueness and rareness of these types of habitats in POH AOR, RC 1 restricts this NWP from use in anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.3 Mangroves and Sea and Freshwater Caves

RC 1 restricts this NWP from being used to authorize activities in mangroves or sea or freshwater caves in Guam, American Samoa (AS), and the Commonwealth of the Northern Mariana Islands (CNMI). Mangroves provide extremely important functions for natural shoreline protection and aquatic species nursery grounds, and sea and freshwater caves are considered unique habitats. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWP could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered

species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWPs, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its

design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWP.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWP was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an "Effect" determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further

consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Activities authorized by this NWP will affect general environmental concerns, such as water, air, noise, and land pollution. The authorized work will also affect the physical, chemical, and biological characteristics of the environment. The adverse effects of the activities authorized by this NWP on general environmental concerns will be minor. Adverse effects to the chemical composition of the aquatic environment will be controlled by general condition 6, which states that the material used for construction must be free from toxic pollutants in toxic amounts.

Activities authorized by this NWP may alter the habitat characteristics of aquatic and terrestrial habitat, decreasing the quantity and quality of habitat for fish and other aquatic organisms. General condition 22 requires mitigation to minimize adverse effects to the aquatic environment through avoidance and minimization at the project site. Compensatory mitigation may be required by district engineers to ensure that the net adverse effects on the aquatic environment are minimal. It is important to note that the Corps scope of review is usually limited to impacts to aquatic resources. Specific environmental concerns are addressed in other sections of this document.

General condition 2 will reduce the adverse effects to fish and other aquatic species by prohibiting activities that substantially disrupt the movements of indigenous aquatic species, unless the primary purpose of the activity is to impound water. Compliance with general conditions 3 and 5 will ensure that the authorized work has minimal adverse effects on spawning areas and shellfish beds, respectively. The authorized work cannot have more than minimal adverse effects on breeding areas for migratory birds, due to the requirements of general condition 4.

Compliance with the Bald and Golden Eagle Protection Act (16 U.S.C. 668(a)-(d)), the Migratory Bird Treaty Act (16 U.S.C. 703; 16 U.S.C. 712), and the Marine Mammal Protection Act (16 U.S.C. 1361 et seq.), including any requirements to obtain take permits, is the responsibility of the project proponent for a particular NWP activity.

Consultation pursuant to the essential fish habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act will occur as necessary for proposed NWP activities that

may adversely affect essential fish habitat. The Coral Reef Advisory in the RC document may help increase awareness of coral reefs and RC 2 which requires a PCN for all activities, as well as the exclusion under RC 1 will both help to ensure that activities authorized by this NWP will result in minimal adverse effects on coral reef habitat.

(e) Wetlands: Same as discussed in the national decision document.

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

(g) Fish and wildlife values: This NWP authorizes discharges associated with U.S. Coast Guard approved bridges over all navigable waters of the United States. Activities authorized by this NWP may alter the habitat characteristics of streams, wetlands, and other waters of the United States, decreasing the quantity and quality of fish and wildlife habitat. Wetland, riparian, and estuarine vegetation provides food and habitat for many species, including foraging areas, resting areas, corridors for wildlife movement, and nesting and breeding grounds. Open waters provide habitat for fish and other aquatic organisms. Fish and other motile animals will avoid the project site during construction and maintenance. Woody riparian vegetation shades streams, which reduces water temperature fluctuations and provides habitat for fish and other aquatic animals. Riparian and estuarine vegetation provides organic matter that is consumed by fish and aquatic invertebrates. Woody riparian vegetation creates habitat diversity in streams when trees and large shrubs fall into the channel, forming snags that provide habitat and shade for fish. The morphology of a stream channel may be altered by activities authorized by this NWP, which can affect fish populations. However, pre-construction notification is required for certain activities authorized by this NWP, which provides district engineers with opportunities to review those activities, assess potential impacts on fish and wildlife values, and ensure that the authorized work results in minimal adverse effects on the aquatic environment. Compensatory mitigation may be required by district engineers to restore, enhance, establish, and/or preserve wetlands and other aquatic habitats to offset losses of waters of the United States. The establishment and maintenance of riparian areas next to open and flowing waters may also be required as compensatory mitigation. These methods of compensatory mitigation will provide fish and wildlife habitat values.

General condition 2 will reduce adverse effects to fish and other aquatic species by prohibiting activities that substantially disrupt the necessary life cycle movements of indigenous aquatic species, unless the primary purpose of the activity is to impound water. Compliance with general conditions 3 and 5 will ensure that the authorized work has minimal adverse effects on spawning areas and shellfish beds, respectively. The authorized work cannot have more than minimal adverse effects on breeding areas for migratory birds, due to the requirements of general condition 4.

Compliance with the Bald and Golden Eagle Protection Act (16 U.S.C. 668(a)-(d)), the Migratory Bird Treaty Act (16 U.S.C. 703; 16 U.S.C. 712), and the Marine Mammal Protection Act (16 U.S.C. 1361 et seq.), including any requirements to obtain take permits, is the responsibility of the project proponent for a particular NWP activity.

Consultation pursuant to the essential fish habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act will occur as necessary for proposed NWP activities that may adversely affect essential fish habitat. Consultation may occur on a case-by-case or programmatic basis. Division and district engineers can impose regional and special conditions to ensure that activities authorized by this NWP will result in minimal adverse effects on essential fish habitat. The Coral Reef Advisory in the RC document may help increase awareness of coral reefs and RC 2 which requires a PCN for all activities, as well as the exclusion under RC 1 will both help to ensure that activities authorized by this NWP will result in minimal adverse effects on coral reef habitat.

- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast,

respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. Regional General Permits authorized 81 floating docks in Hawaii Kai Marina and repeated maintenance dredging of Pearl Harbor on the Island of Oahu. Letters of Permission authorized 100+ day-use mooring buoys in the state of Hawaii and a handful of scientific measuring buoys throughout the POH AOR. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of

the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence

of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be

required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has not authorized any actions using this NWP during the past 10 years. With the aging infrastructure within the POH AOR and the proposed military

relocation on Guam, it is likely that requests for authorization under this NWP may occur. POH estimates that this NWP may be used a maximum of 1 time per year, anticipating less than 1.0 acre impact to waters of the United States in the next five years. For these unavoidable impacts to waters of the U.S., review under this NWP on a case-by-case basis will determine whether compensatory mitigation will be required. We have no scientific evidence, anecdotal or empirical, to suggest the temporary impact to 1.0 acre of waters of the U.S. will result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 15

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

- NWP 21 - Surface Coal Mining Activities
- NWP 29 - Residential Developments
- NWP 34 - Cranberry Production Activities
- NWP 39 - Commercial and Institutional Developments
- NWP 42 - Recreational Activities
- NWP 44 - Mining Activities
- NWP 49 - Coal Remining Activities

NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging

NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI).

The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 25 - Structural Discharges
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant

communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b) To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:
<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement

by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting “Impaired Waters” as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill’s acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes “...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste.” The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland

location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWP's, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP's. While no blanket WQC was issued for Hawaii for the 2007 NWP's, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP's, which we found to be reasonable and not result in a denial of any one or number of NWP's for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQC's. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. Accordingly, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 16
(Return Water from Upland Contained Disposal Areas)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 16, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management Practices (BMPs)”. It also contained the “Definition of Coral Reefs”. Our February 18, 2011 PN proposed keeping these two advisories and eliminating the “Definition of Coral Reefs”.

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the “Use of Embedded or Bottomless Arch Culverts” advisory into it as the advisory was specific to only certain NWP and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWPs. We also incorporated the resource agencies’ comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for “Site-Specific Best Management Practices (BMPs)” and a Regional Condition for “Standard Best Management Practices” and have combined the two into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the “Definition of Coral Reefs” to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWPs.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWPs 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWPs 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWPs 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these

categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWPs in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWPs require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWPs have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWPs. We have also added a

condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN)) and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWP and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional

Conditions that apply to all NWP in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

No waters were excluded from the use of NWP 16.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.2 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWP, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWP.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be

notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.

- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood

control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer

determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage

patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used, and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized no actions using the NWP considered in this document during the past five years. Based on anecdotal evidence and the lack of past authorizations under this NWP, POH expects no to minimal usage, and therefore, no minimal effects that would result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 3

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

NWP 21 - Surface Coal Mining Activities
NWP 29 - Residential Developments
NWP 34 - Cranberry Production Activities
NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges
NWP 25 - Structural Discharges
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation or, under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

- a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:
 - (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
 - (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.

(3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections

afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project,

site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent

the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at: <http://www.epa.gov/owow/NPS/lid/>.

**8. State of Hawaii, Department of Health, Clean Water Branch (DOH)
Requirements (Projects in the State of Hawaii Only)**

- a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

- b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

- c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:
 - (1) Identify the waterbody as an Impaired Water; and
 - (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

- d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without

adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States.

For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the United States.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these documents were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWP's, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP's. While no blanket WQC was issued for Hawaii for the 2007 NWP's, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP's, which we found to be reasonable and not result in a denial of any one or number of NWP's for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQC's. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. Accordingly, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 17 (Hydropower Projects)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 17, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

No waters were excluded from the use of NWP 17.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.2 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use

upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWPs, it was fashioned from numerous categories of activities

authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWPs.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the

course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project

manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.

(t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service,

National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local

maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of

organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized no actions using the NWP considered in this document during the past five years. Based on anecdotal evidence and the lack of past authorizations under this NWP, POH expects no to minimal usage, and therefore, no minimal effects that would result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 3

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

- NWP 21 - Surface Coal Mining Activities
- NWP 29 - Residential Developments
- NWP 34 - Cranberry Production Activities
- NWP 39 - Commercial and Institutional Developments
- NWP 42 - Recreational Activities
- NWP 44 - Mining Activities

NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges

NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 25 - Structural Discharges
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant

communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:
<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement

by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting “Impaired Waters” as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill’s acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes “...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste.” The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States.

For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain

contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the United States.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these documents were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWP's, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP's. While no blanket WQC was issued for Hawaii for the 2007 NWP's, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP's, which we found to be reasonable and not result in a denial of any one or number of NWP's for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35,

36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. Accordingly, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 18 (Minor Discharges)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 18, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

3.1.1 Anchialine pools, montane bogs, natural freshwater lakes and saline lakes

Due to the uniqueness and rareness of these types of habitats in POH AOR, RC 1 restricts this NWP from use in anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.2 Mangroves and Sea and Freshwater Caves

RC 1 restricts this NWP from being used to authorize activities in mangroves or sea or freshwater caves in Guam, American Samoa (AS), and the Commonwealth of the Northern Mariana Islands (CNMI). Mangroves provide extremely important functions for natural shoreline protection and aquatic species nursery grounds, and sea and freshwater caves are considered unique habitats. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.3 Stream Modification

RC 1 restricts this NWP from being used within POH to authorize permanent stream channelization or construction of dams that impound waters of the United States.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWPs, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an "Effect" determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWPs.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect* or *May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any

blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWP would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an "Effect" determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

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

(b) Economics: Same as discussed in the national decision document.

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

(d) General environmental concerns: Activities authorized by this NWP will affect general environmental concerns, such as water, air, noise, and land pollution. The authorized work will also affect the physical, chemical, and biological characteristics of the environment. The adverse effects of the activities authorized by this NWP on general environmental concerns will be minor. Adverse effects to the chemical composition of the aquatic environment will be

controlled by general condition 6, which states that the material used for construction must be free from toxic pollutants in toxic amounts.

Activities authorized by this NWP may alter the habitat characteristics of aquatic and terrestrial habitat, decreasing the quantity and quality of habitat for fish and other aquatic organisms. General condition 22 requires mitigation to minimize adverse effects to the aquatic environment through avoidance and minimization at the project site. Compensatory mitigation may be required by district engineers to ensure that the net adverse effects on the aquatic environment are minimal. It is important to note that the Corps scope of review is usually limited to impacts to aquatic resources. Specific environmental concerns are addressed in other sections of this document.

General condition 2 will reduce the adverse effects to fish and other aquatic species by prohibiting activities that substantially disrupt the movements of indigenous aquatic species, unless the primary purpose of the activity is to impound water. Compliance with general conditions 3 and 5 will ensure that the authorized work has minimal adverse effects on spawning areas and shellfish beds, respectively. The authorized work cannot have more than minimal adverse effects on breeding areas for migratory birds, due to the requirements of general condition 4.

Compliance with the Bald and Golden Eagle Protection Act (16 U.S.C. 668(a)-(d)), the Migratory Bird Treaty Act (16 U.S.C. 703; 16 U.S.C. 712), and the Marine Mammal Protection Act (16 U.S.C. 1361 et seq.), including any requirements to obtain take permits, is the responsibility of the project proponent for a particular NWP activity.

Consultation pursuant to the essential fish habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act will occur as necessary for proposed NWP activities that may adversely affect essential fish habitat. The Coral Reef Advisory in the RC document may help increase awareness of coral reefs and RC 2 which requires a PCN for all activities, as well as the exclusion under RC 1 will both help to ensure that activities authorized by this NWP will result in minimal adverse effects on coral reef habitat.

(e) Wetlands: Same as discussed in the national decision document.

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

(g) Fish and wildlife values: This NWP authorizes the minor discharge of fill material in all waters of the United States. Activities authorized by this NWP may alter the habitat characteristics of streams, wetlands, and other waters of the United States, decreasing the quantity and quality of fish and wildlife habitat. Wetland, riparian, and estuarine vegetation provides food and habitat for many species, including foraging areas, resting areas, corridors for wildlife movement, and nesting and breeding grounds. Open waters provide habitat for fish and other aquatic organisms. Fish and other motile animals will avoid the project site during construction and maintenance. Woody riparian vegetation shades streams, which reduces water temperature fluctuations and provides habitat for fish and other aquatic animals. Riparian and estuarine vegetation provides organic matter that is consumed by fish and aquatic invertebrates.

Woody riparian vegetation creates habitat diversity in streams when trees and large shrubs fall into the channel, forming snags that provide habitat and shade for fish. The morphology of a stream channel may be altered by activities authorized by this NWP, which can affect fish populations. However, pre-construction notification is required for certain activities authorized by this NWP, which provides district engineers with opportunities to review those activities, assess potential impacts on fish and wildlife values, and ensure that the authorized work results in minimal adverse effects on the aquatic environment. Compensatory mitigation may be required by district engineers to restore, enhance, establish, and/or preserve wetlands and other aquatic habitats to offset losses of waters of the United States. The establishment and maintenance of riparian areas next to open and flowing waters may also be required as compensatory mitigation. These methods of compensatory mitigation will provide fish and wildlife habitat values.

General condition 2 will reduce adverse effects to fish and other aquatic species by prohibiting activities that substantially disrupt the necessary life cycle movements of indigenous aquatic species, unless the primary purpose of the activity is to impound water. Compliance with general conditions 3 and 5 will ensure that the authorized work has minimal adverse effects on spawning areas and shellfish beds, respectively. The authorized work cannot have more than minimal adverse effects on breeding areas for migratory birds, due to the requirements of general condition 4.

Compliance with the Bald and Golden Eagle Protection Act (16 U.S.C. 668(a)-(d)), the Migratory Bird Treaty Act (16 U.S.C. 703; 16 U.S.C. 712), and the Marine Mammal Protection Act (16 U.S.C. 1361 et seq.), including any requirements to obtain take permits, is the responsibility of the project proponent for a particular NWP activity.

Consultation pursuant to the essential fish habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act will occur as necessary for proposed NWP activities that may adversely affect essential fish habitat. Consultation may occur on a case-by-case or programmatic basis. Division and district engineers can impose regional and special conditions to ensure that activities authorized by this NWP will result in minimal adverse effects on essential fish habitat. The Coral Reef Advisory in the RC document may help increase awareness of coral reefs and RC 2 which requires a PCN for all activities, as well as the exclusion under RC 1 will both help to ensure that activities authorized by this NWP will result in minimal adverse effects on coral reef habitat.

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

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

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

(k) Navigation: Same as discussed in the national decision document.

(l) Shore erosion and accretion: Same as discussed in the national decision document.

(m) Recreation: Same as discussed in the national decision document.

- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The

remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. Regional General Permits authorized 81 floating docks in Hawaii Kai Marina and repeated maintenance dredging of Pearl Harbor on the Island of Oahu. Letters of Permission authorized 100+ day-use mooring buoys in the state of Hawaii and a handful of scientific measuring buoys throughout the POH AOR. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.

(e) Normal water level fluctuations: Same as discussed in the national decision document.

(f) Salinity gradients: Same as discussed in the national decision document.

(g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

- (6) Riffle and pool complexes: Same as discussed in the national decision document.
- (k) Municipal and private water supplies: Same as discussed in the national decision document.
- (l) Recreational and commercial fisheries: Same as discussed in the national decision document.
- (m) Water-related recreation: Same as discussed in the national decision document.
- (n) Aesthetics: Same as discussed in the national decision document.
- (o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized 5 actions using the NWP considered in this document during the past five years. With the proposed military relocation on Guam, POH estimates that this NWP may be used approximately 3 times per year, anticipating approximately 1.5 acres of impact to waters of the United States in the next five years. For these unavoidable impacts to waters of the U.S., review under this NWP on a case-by-case basis will determine whether compensatory mitigation will be required. We have no scientific evidence, anecdotal or empirical, to suggest the temporary impact to 1.5 acres of waters of the U.S. will result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects

to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 18

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

- NWP 21 - Surface Coal Mining Activities
- NWP 29 - Residential Developments
- NWP 34 - Cranberry Production Activities
- NWP 39 - Commercial and Institutional Developments
- NWP 42 - Recreational Activities
- NWP 44 - Mining Activities
- NWP 49 - Coal Remining Activities
- NWP 50 - Underground Coal Mining Activities
- NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 13 – Bank Stabilization
- NWP 14 – Linear Transportation Projects
- NWP 40 – Agricultural Activities
- NWP 41 – Reshaping Existing Drainage Ditches
- NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

- NWP 3 – Maintenance
- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 12 – Utility Line Activities

NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of

anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures

NWP 12 - Utility Line Activities

NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges

NWP 25 - Structural Discharges

NWP 40 - Agricultural Activities

NWP 41 - Reshaping Existing Drainage Ditches

NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 30, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

(1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.

(2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.

(3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered

Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-

256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury. Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.

- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.
- i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.
- j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.
- k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).
- l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.
- m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result

in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at: <http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

- a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All special conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification. The special conditions are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.
- b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.
- c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:
 - (1) Identify the waterbody as an Impaired Water; and
 - (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.
- d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling

and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWPs, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWPs. While no blanket WQC was issued for Hawaii for the 2007 NWPs, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWPs, which we found to be reasonable and not result in a denial of any one or number of NWPs for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. Accordingly, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 19 (Minor Dredging)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 19, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

3.1.1 Anchialine pools, montane bogs, natural freshwater lakes and saline lakes

Due to the uniqueness and rareness of these types of habitats in POH AOR, RC 1 restricts this NWP from use in anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.2 Mangroves and Sea and Freshwater Caves

RC 1 restricts this NWP from being used to authorize activities in mangroves or sea or freshwater caves in Guam, American Samoa (AS), and the Commonwealth of the Northern Mariana Islands (CNMI). Mangroves provide extremely important functions for natural shoreline protection and aquatic species nursery grounds, and sea and freshwater caves are considered unique habitats. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently,

these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used

if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWPs, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWPs.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions

that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect* or *May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff’s time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone

conference on 1 December 2011. They were concerned on how the NWP would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to “flag” applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural,

or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.

- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure

on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. Regional General Permits authorized 81 floating docks in Hawaii Kai Marina and repeated maintenance dredging of Pearl Harbor on the Island of Oahu. Letters of Permission authorized 100+ day-use mooring buoys in the state of Hawaii and a handful of scientific measuring buoys throughout the POH AOR. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

(a) Substrate: Minor dredging activities in navigable waters of the United States will alter the substrate of those waters, by removing the upper layers of that substrate. This may change the physical, chemical, and biological characteristics of the substrate. RC 5 prohibits the placement of temporary fills from dredging upon the substrate. Higher rates of erosion or sediment suspension may result during construction, but general condition 12 requires the use of appropriate measures to control soil erosion and sediment.

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

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

(d) Current patterns and water circulation: Same as discussed in the national decision document.

(e) Normal water level fluctuations: Same as discussed in the national decision document.

(f) Salinity gradients: Same as discussed in the national decision document.

(g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can

also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized 3 actions using the NWP considered in this document during the past five years, impacting a total of .03 acres. With the proposed military relocation on Guam, POH estimates that this NWP may be used approximately 2 times per year, anticipating approximately 0.2 acres of impact to waters of the United States in the next five years. For these unavoidable impacts to waters of the U.S., review under this NWP on a case-by-case basis will determine whether compensatory mitigation will be required. We have no scientific evidence, anecdotal or empirical, to suggest the temporary impact to 0.2 acres of waters of the U.S. will result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 19

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

- NWP 21 - Surface Coal Mining Activities
- NWP 29 - Residential Developments
- NWP 34 - Cranberry Production Activities
- NWP 39 - Commercial and Institutional Developments
- NWP 42 - Recreational Activities
- NWP 44 - Mining Activities
- NWP 49 - Coal Remining Activities
- NWP 50 - Underground Coal Mining Activities
- NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWP's may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

- NWP 3 - Maintenance
- NWP 7 - Outfall Structures and Associated Intake Structures
- NWP 12 - Utility Line Activities
- NWP 13 - Bank Stabilization
- NWP 14 - Linear Transportation Projects
- NWP 18 - Minor Discharges
- NWP 19 - Minor Dredging
- NWP 33 - Temporary Construction, Access, and Dewatering
- NWP 40 - Agricultural Activities
- NWP 41 - Reshaping Existing Drainage Ditches
- NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWP's may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

- NWP 7 - Outfall Structures and Associated Intake Structures
- NWP 12 - Utility Line Activities
- NWP 14 - Linear Transportation Projects
- NWP 18 - Minor Discharges
- NWP 25 - Structural Discharges
- NWP 40 - Agricultural Activities
- NWP 41 - Reshaping Existing Drainage Ditches
- NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWP's in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of

the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any

circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.

b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall,

storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.

c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.

d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).

e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.

f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.

g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.

h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:
<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations

requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting “Impaired Waters” as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill’s acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes “...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste.” The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these documents were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWP's, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP's. While no blanket WQC was issued for Hawaii for the 2007 NWP's, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP's, which we found to be reasonable and not result in a denial of any one or number of NWP's for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the

NWPs at this time. Accordingly, the NWPs are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 20
(Response Operations for Oil and Hazardous Substances)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 20, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management Practices (BMPs)”. It also contained the “Definition of Coral Reefs”. Our February 18, 2011 PN proposed keeping these two advisories and eliminating the “Definition of Coral Reefs”.

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the “Use of Embedded or Bottomless Arch Culverts” advisory into it as the advisory was specific to only certain NWP and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWPs. We also incorporated the resource agencies’ comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for “Site-Specific Best Management Practices (BMPs)” and a Regional Condition for “Standard Best Management Practices” and have combined the two into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the “Definition of Coral Reefs” to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWPs.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWPs 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWPs 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWPs 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these

categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we

have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN)) and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWP's and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could

result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will

ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

3.1 Waters excluded from use of this NWP

No waters were excluded from the use of NWP 20.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.2 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWP, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWP.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be

notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.

- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. Regional General Permits authorized 81 floating docks in Hawaii Kai Marina and repeated maintenance dredging of Pearl Harbor on the Island of Oahu. Letters of Permission authorized 100+ day-use mooring

buoys in the state of Hawaii and a handful of scientific measuring buoys throughout the POH AOR. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

(a) Substrate: Discharges of dredged or fill material into waters of the United States will alter the substrate of those waters, usually replacing the aquatic area with dry land, and changing the physical, chemical, and biological characteristics of the substrate. Temporary fills may be placed upon the substrate, but must be removed upon completion of the work (see general condition 13). Higher rates of erosion may result during cleanup activities, but general condition 12 requires the use of appropriate measures to control soil erosion and sediment. RC 5 prohibits the placement of temporary fills from authorized work upon the substrate in flowing waters or tidally-influenced waters. Higher rates of erosion or sediment suspension may result during construction, but general condition 12 requires the use of appropriate measures to control soil erosion and sediment.

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

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

(d) Current patterns and water circulation: Same as discussed in the national decision document.

(e) Normal water level fluctuations: Same as discussed in the national decision document.

(f) Salinity gradients: Same as discussed in the national decision document.

(g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

- (6) Riffle and pool complexes: Same as discussed in the national decision document.
- (k) Municipal and private water supplies: Same as discussed in the national decision document.
- (l) Recreational and commercial fisheries: Same as discussed in the national decision document.
- (m) Water-related recreation: Same as discussed in the national decision document.
- (n) Aesthetics: Same as discussed in the national decision document.
- (o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has not authorized any actions using the NWP considered in this document during the past 10 years. POH does not anticipate use of this NWP; however, accidents do occur and this NWP may be used. Impacts to waters of the United States in the next five years will be minimal with the applicable general and regional conditions and significant cumulative or greater than minimal adverse impacts are not expected.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has

and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 20

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

- NWP 21 - Surface Coal Mining Activities
- NWP 29 - Residential Developments
- NWP 34 - Cranberry Production Activities
- NWP 39 - Commercial and Institutional Developments
- NWP 42 - Recreational Activities
- NWP 44 - Mining Activities
- NWP 49 - Coal Remining Activities
- NWP 50 - Underground Coal Mining Activities
- NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 13 – Bank Stabilization
- NWP 14 – Linear Transportation Projects
- NWP 40 – Agricultural Activities
- NWP 41 – Reshaping Existing Drainage Ditches
- NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

- NWP 3 – Maintenance
- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 12 – Utility Line Activities
- NWP 14 – Linear Transportation Projects
- NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities

NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be

authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures

NWP 12 - Utility Line Activities

NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges

NWP 25 - Structural Discharges

NWP 40 - Agricultural Activities

NWP 41 - Reshaping Existing Drainage Ditches

NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be

avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of

concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.

- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.
- i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.
- j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.
- k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).
- l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.
- m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result

in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:
<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

- a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.
- b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.
- c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:
 - (1) Identify the waterbody as an Impaired Water; and
 - (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.
- d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling

and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWPs, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWPs. While no blanket WQC was issued for Hawaii for the 2007 NWPs, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWPs, which we found to be reasonable and not result in a denial of any one or number of NWPs for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. Accordingly, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 22 (Removal of Vessels)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 22, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

No waters were excluded from the use of NWP 22.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.2 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use

upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWPs, it was fashioned from numerous categories of activities

authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWPs.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the

course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project

manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.

(t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. Regional General Permits authorized 81 floating docks in Hawaii Kai Marina and repeated maintenance dredging of Pearl Harbor on the Island of Oahu. Letters of Permission authorized 100+ day-use mooring buoys in the state of Hawaii and a handful of scientific measuring buoys throughout the POH AOR. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical

habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that

remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized 7 actions using the NWP considered in this document during the past five years, impacting a total of .15 acres. POH estimates that this NWP may be used approximately 2 times per year, anticipating approximately 0.2 acres of impact to waters of the United States in the next five years. For these unavoidable impacts to waters of the U.S., review under this NWP on a case-by-case basis will determine whether compensatory mitigation will be required. We have no scientific evidence, anecdotal or empirical, to suggest the temporary impact to 0.2 acres of waters of the U.S. will result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 22

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

NWP 21 - Surface Coal Mining Activities
NWP 29 - Residential Developments

NWP 34 - Cranberry Production Activities
NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures

NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 25 - Structural Discharges

NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be

downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project

specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWPs do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at: <http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 5 – Sidcasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWPs, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWPs. While no blanket WQC was issued for Hawaii for the 2007 NWPs, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWPs, which we found to be reasonable and not result in a denial of any one or number of NWPs for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWPs in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWPs at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP at this time. Accordingly, the NWP are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 23 (Approved Categorical Exclusions)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 23, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

No waters were excluded from the use of NWP 23.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.2 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use

upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWPs, it was fashioned from numerous categories of activities

authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWPs.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the

course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project

manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.

(t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service,

National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local

maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized no actions using the NWP considered in this document during the past five years. Based on anecdotal evidence and the lack of past authorizations under this NWP, POH expects no to minimal usage, and therefore, no minimal effects that would result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 3

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

- NWP 21 - Surface Coal Mining Activities
- NWP 29 - Residential Developments
- NWP 34 - Cranberry Production Activities
- NWP 39 - Commercial and Institutional Developments
- NWP 42 - Recreational Activities
- NWP 44 - Mining Activities

NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges

NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 25 - Structural Discharges
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation or, under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant

communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale weebler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The

project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.

b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.

c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.

d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).

e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.

f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.

g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.

h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at: <http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the

DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting “Impaired Waters” as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill’s acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes “...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste.” The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States.

For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the United States.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWP's, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP's. While no blanket WQC was issued for Hawaii for the 2007 NWP's, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP's, which we found to be reasonable and not result in a denial of any one or number of NWP's for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the

NWPs at this time. Accordingly, the NWPs are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 25 (Structural Discharges)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 25, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

RC 1 restricts NWP 25 from use within POH to authorize permanent stream channelization or construction of dams that impound waters of the United States. There are no other waters excluded from use of NWP 25.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, all NWPs will require submittal of a PCN to POH.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers

the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition,

NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWPs, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWPs.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site,

formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to

comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect*

finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.

- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood

control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer

determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized 92 actions using the NWP considered in this document during the past five years, with recorded impacts of 0.2 acres to waters of the U.S. from 25 actions in FY 2010. POH estimates that this NWP may be used approximately 30 times per year, anticipating approximately 1.0 acres (using the 0.2 acre per year figure from FY 2010) of impact to waters of the United States in the next five years. For these unavoidable impacts to waters of the U.S., review under this NWP on a case-by-case basis will determine whether compensatory mitigation will be required. We have no scientific evidence, anecdotal or empirical, to suggest the temporary impact to 1.0 acres of waters of the U.S. will result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 3

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

NWP 21 - Surface Coal Mining Activities
NWP 29 - Residential Developments
NWP 34 - Cranberry Production Activities
NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities

NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWP's may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures

NWP 12 - Utility Line Activities

NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges

NWP 25 - Structural Discharges

NWP 40 - Agricultural Activities

NWP 41 - Reshaping Existing Drainage Ditches

NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWP's in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWP's within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation or, under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana

common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.

- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.
- i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.
- j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.
- k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).
- l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.
- m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration

techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which

generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWPs, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWPs. While no blanket WQC was issued for Hawaii for the 2007 NWPs, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWPs, which we found to be reasonable and not result in a denial of any one or number of NWPs for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWPs in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this

NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWPs at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWPs 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWPs at this time. Accordingly, the NWPs are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

Based on the considerations discussed above, and in accordance with 33 CFR 330.4(e)(1) and 330.5(c), I have determined that this NWP, including its terms and conditions, all regional

conditions, and limitations, will authorize only those activities with minimal adverse effects on the aquatic environment, individually or cumulatively.

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 27
(Aquatic Habitat Restoration, Establishment, and Enhancement Activities)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 27, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management Practices (BMPs)”. It also contained the “Definition of Coral Reefs”. Our February 18, 2011 PN proposed keeping these two advisories and eliminating the “Definition of Coral Reefs”.

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the “Use of Embedded or Bottomless Arch Culverts” advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for “Site-Specific Best Management Practices (BMPs)” and a Regional Condition for “Standard Best Management Practices” and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the “Definition of Coral Reefs” to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these

categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we

have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN)) and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWP's and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could

result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will

ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.5 Proposed Regional Condition 6 – Road Crossings

As discussed in 2.2.1 above, RC 6 was created to incorporate the “Use of Embedded or Bottomless Arch Culverts” advisory found in the February 18, 2011 PN and to better inform the public as to its applicability to many NWP. The resource agencies’ comments were reasonable for minimizing impacts to the aquatic environment and are enforceable. Accordingly, they were included in the RC. Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.6 Proposed Regional Condition 7 – Bank Stabilization

This was originally labeled RC 5 (Bank Stabilization) in the February 18, 2011 PN. In the PN, POH proposed allowing the use of rigid structures if the district engineer made a written determination that such structures would be preferred for purposes of preventing sedimentation impacts to adjacent receiving waters.

We reworded this RC to clarify that it could be waived if the district engineer has made a written determination that the structure would not result in more than minimal impacts to the aquatic environment and downstream channel stability and would minimize sedimentation impacts to adjacent receiving waters.

NOAA, EPA and FWS recommended (in subsequent face-to-face meetings) that the waiver be supported by baseline stream data with the appropriate analysis of impacts to the aquatic environment. A requirement to provide baseline stream data would put an unnecessary burden on applicants beyond that intended for submittal of PCNs for verification under the NWPs. We believe the “appropriate analysis of impacts to the aquatic environment” falls within the best professional judgment of the POH Regulatory staff in determining if the minimal impacts threshold is exceeded. We will not include this baseline stream data requirement in the RC.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

3.1.1 National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas

RC 1 restricts this NWP from use in National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas because they have particular environmental or ecological significance. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use

upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWPs, it was fashioned from numerous categories of activities

authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWPs.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the

course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project

manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.

(t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service,

National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

(a) Substrate: Discharges of dredged or fill material into waters of the United States will result in minor changes to the substrate of those waters, since the NWP authorizes activities that restore, establish, or enhance aquatic habitats. There will be beneficial changes to the physical, chemical, and biological characteristics of the substrate. The original substrate may be removed and replaced with material that will improve the growth and reproduction of vegetation or improve the aquatic habitat characteristics of the area. Some erosion may occur during construction, but general condition 12 requires the use of appropriate measures to control soil erosion and sediment. RC 5 prohibits sidestepping and will reduce potential for adverse impacts to the surrounding substrate.

(b) Suspended particulates/turbidity: Depending on the method of construction, soil erosion and sediment control measures, equipment, composition of the bottom substrate, and wind and current conditions during construction, fill material placed in open waters will temporarily increase water turbidity. Particulates will be resuspended in the water column during removal of temporary fills. The turbidity plume will normally be limited to the immediate vicinity of the disturbance and should dissipate shortly after each phase of the construction activity. RC 2, sub-item 7 requires BMPs be in place to minimize and contain turbidity to the immediate vicinity of the authorized work. General condition 12 requires the permittee to stabilize exposed soils and other fills, which will reduce turbidity. NWP activities cannot create turbidity plumes that smother important spawning areas downstream (see general condition 3).

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

(d) Current patterns and water circulation: Same as discussed in the national decision document.

(e) Normal water level fluctuations: Same as discussed in the national decision document.

(f) Salinity gradients: Same as discussed in the national decision document.

(g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

- (6) Riffle and pool complexes: Same as discussed in the national decision document.
- (k) Municipal and private water supplies: Same as discussed in the national decision document.
- (l) Recreational and commercial fisheries: Same as discussed in the national decision document.
- (m) Water-related recreation: Same as discussed in the national decision document.
- (n) Aesthetics: Same as discussed in the national decision document.
- (o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized 92 actions using the NWP considered in this document during the past five years, with recorded impacts of 0.2 acres to waters of the U.S. from 25 actions in FY 2010. POH estimates that this NWP may be used approximately 30 times per year, anticipating approximately 1.0 acres (using the 0.2 acre per year figure from FY 2010) of impact to waters of the United States in the next five years. For these unavoidable impacts to waters of the U.S., review under this NWP on a case-by-case basis will determine whether compensatory mitigation will be required. We have no scientific evidence, anecdotal or empirical, to suggest the temporary impact to 1.0 acres of waters of the U.S. will result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe

that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 27

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

NWP 21 - Surface Coal Mining Activities
NWP 29 - Residential Developments
NWP 34 - Cranberry Production Activities
NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects

NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef.

No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

- NWP 7 - Outfall Structures and Associated Intake Structures
- NWP 12 - Utility Line Activities
- NWP 14 - Linear Transportation Projects
- NWP 18 - Minor Discharges
- NWP 25 - Structural Discharges
- NWP 40 - Agricultural Activities
- NWP 41 - Reshaping Existing Drainage Ditches
- NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach

fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

(1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.

(2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.

(3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected

would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.

- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.
- i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.
- j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.
- k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).
- l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.
- m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result

in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:
<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

- a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.
- b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.
- c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:
 - (1) Identify the waterbody as an Impaired Water; and
 - (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.
- d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling

and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

10.4 Regional Condition 6 – Road Crossings

For any activity authorized under NWP 3, 14, 27, 37, 40, 41, or 45, use of embedded or bottomless arch culverts is required when practicable, especially where frequent culvert maintenance or replacement is needed. Culverts must maintain the original and natural full bank capacity (cross-sectional volume) of the channel.

If a bottomless culvert cannot be used, a rock apron with an appropriate slope (determined on a site or project specific basis), or other appropriate measures must be incorporated to prevent perching of the culvert or scouring that could obstruct up- and downstream native stream species migration. To preserve a natural stream bed, bridge designs that span the stream or river, including pier or pile supported spans, are encouraged.

10.5 Regional Condition 7 – Bank Stabilization.

Rigid structures such as pre-cast concrete, concrete rubble masonry, and cast-in-place structures may not be used for bank stabilization if authorized under the following NWPs:

- NWP 13 - Bank Stabilization
- NWP 14 - Linear Transportation Projects
- NWP 27 - Aquatic Habitat Restoration, Establishment, and Enhancement Activities
- NWP 45 - Repair of Uplands Damaged by Discrete Events

This exclusion may be waived by the district engineer with a written determination concluding that the structures will result in minimal adverse effects to the aquatic environment and

downstream channel stability and will minimize sedimentation impacts to adjacent receiving waters.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWP's, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP's. While no blanket WQC was issued for Hawaii for the 2007 NWP's, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP's, which we found to be reasonable and not result in a denial of any one or number of NWP's for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQC's. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. Accordingly, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 30 (Moist Soil Management for Wildlife)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 30, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

3.1.1 National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas

RC 1 restricts this NWP from use in National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas because they have particular environmental or ecological significance. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWP General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWP, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWP.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect

determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not

have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to “flag” applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a

review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.

- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor

discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.

(g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts

will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

(6) Riffle and pool complexes: Same as discussed in the national decision document.

- (k) Municipal and private water supplies: Same as discussed in the national decision document.
- (l) Recreational and commercial fisheries: Same as discussed in the national decision document.
- (m) Water-related recreation: Same as discussed in the national decision document.
- (n) Aesthetics: Same as discussed in the national decision document.
- (o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized no actions using the NWP considered in this document during the past five years. Based on anecdotal evidence and the lack of past authorizations under this NWP, POH expects no to minimal usage, and therefore, no minimal effects that would result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 3

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

NWP 21 - Surface Coal Mining Activities
NWP 29 - Residential Developments
NWP 34 - Cranberry Production Activities
NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities

NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWP's may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures

NWP 12 - Utility Line Activities

NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges

NWP 25 - Structural Discharges

NWP 40 - Agricultural Activities

NWP 41 - Reshaping Existing Drainage Ditches

NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWP's in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWP's within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation or, under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana

common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.

h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration

techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which

generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWPs, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWPs. While no blanket WQC was issued for Hawaii for the 2007 NWPs, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWPs, which we found to be reasonable and not result in a denial of any one or number of NWPs for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWPs in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this

NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWPs at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWPs 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWPs at this time. Accordingly, the NWPs are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

Based on the considerations discussed above, and in accordance with 33 CFR 330.4(e)(1) and 330.5(c), I have determined that this NWP, including its terms and conditions, all regional

conditions, and limitations, will authorize only those activities with minimal adverse effects on the aquatic environment, individually or cumulatively.

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 31 (Maintenance of Existing Flood Control Facilities)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 31, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

No waters were excluded from the use of NWP 31.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.2 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use

upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWPs, it was fashioned from numerous categories of activities

authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWPs.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the

course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project

manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try and resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.

(t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service,

National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local

maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized 92 actions using the NWP considered in this document during the past five years, with recorded impacts of 0.2 acres to waters of the U.S. from 25 actions in FY 2010. POH estimates that this NWP may be used approximately 30 times per year, anticipating approximately 1.0 acres (using the 0.2 acre per year figure from FY 2010) of impact to waters of the United States in the next five years. For these unavoidable impacts to waters of the U.S., review under this NWP on a case-by-case basis will determine whether compensatory mitigation will be required. We have no scientific evidence, anecdotal or empirical, to suggest the temporary impact to 1.0 acres of waters of the U.S. will result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 3

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

NWP 21 - Surface Coal Mining Activities
NWP 29 - Residential Developments
NWP 34 - Cranberry Production Activities
NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges
NWP 25 - Structural Discharges
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

- a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:
 - (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
 - (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.

(3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections

afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project,

site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent

the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at: <http://www.epa.gov/owow/NPS/lid/>.

**8. State of Hawaii, Department of Health, Clean Water Branch (DOH)
Requirements (Projects in the State of Hawaii Only)**

- a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.
- b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.
- c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:
 - (1) Identify the waterbody as an Impaired Water; and
 - (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.
- d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without

adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these documents were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWPs, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWPs. While no blanket WQC was issued for Hawaii for the 2007 NWPs, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWPs, which we found to be reasonable and not result in a denial of any one or number of NWPs for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWPs in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWPs at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP at this time. Accordingly, the NWP are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 32
(Completed Enforcement Actions)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 4, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management Practices (BMPs)”. It also contained the “Definition of Coral Reefs”. Our February 18, 2011 PN proposed keeping these two advisories and eliminating the “Definition of Coral Reefs”.

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the “Use of Embedded or Bottomless Arch Culverts” advisory into it as the advisory was specific to only certain NWP and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWPs. We also incorporated the resource agencies’ comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for “Site-Specific Best Management Practices (BMPs)” and a Regional Condition for “Standard Best Management Practices” and have combined the two into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the “Definition of Coral Reefs” to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWPs.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWPs 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWPs 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWPs 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these

categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWPs in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWPs require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWPs have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWPs. We have also added a

condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN)) and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional

Conditions that apply to all NWP in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

No waters were excluded from the use of NWP 32.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.2 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWP, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWP.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be

notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.

- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical

habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that

remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required. .

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized two (2) actions using the NWP considered in this document during the past five years, with impacts spread over hundreds of acres of waters of the U.S. POH estimates that this NWP may be used approximately one (1) time per year, anticipating up to 25.0 acres of impact to waters of the United States in the next five years (this NWP allows impacts to no more than five acres of non-tidal and one-acre of tidal waters of the U.S.). For these unavoidable impacts to waters of the U.S., review under this NWP on a case-by-case basis will determine whether compensatory mitigation will be required. We have no scientific evidence, anecdotal or empirical, to suggest the temporary impact to 25.0 acre of waters of the U.S. will result in a significant cumulative or greater than minimal adverse impact. Additionally, most enforcement resolution will likely involve restoration, enhancement or creation of waters of the U.S., therefore, the impacts will likely be positive to waters of the U.S. which have been impacted by unauthorized activities.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 32

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

NWP 21 - Surface Coal Mining Activities
NWP 29 - Residential Developments
NWP 34 - Cranberry Production Activities
NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities

NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWP's may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures

NWP 12 - Utility Line Activities

NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges

NWP 25 - Structural Discharges

NWP 40 - Agricultural Activities

NWP 41 - Reshaping Existing Drainage Ditches

NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWP's in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWP's within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the

Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.

h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration

techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

- a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All special conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification. The special conditions are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.
- b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.
- c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:
 - (1) Identify the waterbody as an Impaired Water; and
 - (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.
- d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which

generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWPs, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWPs. While no blanket WQC was issued for Hawaii for the 2007 NWPs, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWPs, which we found to be reasonable and not result in a denial of any one or number of NWPs for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWPs in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this

NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWPs at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWPs 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWPs at this time. Accordingly, the NWPs are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

Based on the considerations discussed above, and in accordance with 33 CFR 330.4(e)(1) and 330.5(c), I have determined that this NWP, including its terms and conditions, all regional

conditions, and limitations, will authorize only those activities with minimal adverse effects on the aquatic environment, individually or cumulatively.

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 33
(Temporary Construction, Access and Dewatering)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 33, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

3.1.1 Anchialine pools, montane bogs, natural freshwater lakes and saline lakes

Due to the uniqueness and rareness of these types of habitats in POH AOR, RC 1 restricts this NWP from use in anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.2 Mangroves and Sea and Freshwater Caves

RC 1 restricts this NWP from being used to authorize activities in mangroves or sea or freshwater caves in Guam, American Samoa (AS), and the Commonwealth of the Northern Mariana Islands (CNMI). Mangroves provide extremely important functions for natural shoreline protection and aquatic species nursery grounds, and sea and freshwater caves are considered unique habitats. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently,

these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used

if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWPs, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWPs.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions

that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect* or *May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff’s time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone

conference on 1 December 2011. They were concerned on how the NWP would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to “flag” applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural,

or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.

- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure

on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has provided and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

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

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

- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

- (h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.
- (i) Other wildlife: Same as discussed in the national decision document.
- (j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:
 - (1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic

environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require

the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWP for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required. .

- (6) Riffle and pool complexes: Same as discussed in the national decision document.
- (k) Municipal and private water supplies: Same as discussed in the national decision document.
- (l) Recreational and commercial fisheries: Same as discussed in the national decision document.
- (m) Water-related recreation: Same as discussed in the national decision document.
- (n) Aesthetics: Same as discussed in the national decision document.
- (o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized 7 actions using the NWP considered in this document during the past five years, with recorded impacts to 5,600 linear feet of waters of the U.S. POH estimates that this NWP may be used approximately 3 times per year, anticipating approximately 1.0 acres of impact to waters of the United States in the next five years. For these unavoidable impacts to waters of the U.S., review under this NWP on a case-by-case basis will determine whether compensatory mitigation will be required. We have no scientific evidence, anecdotal or empirical, to suggest the temporary impact to 1.0 acres of waters of the U.S. will result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 33

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

- NWP 21 - Surface Coal Mining Activities
- NWP 29 - Residential Developments
- NWP 34 - Cranberry Production Activities
- NWP 39 - Commercial and Institutional Developments
- NWP 42 - Recreational Activities
- NWP 44 - Mining Activities
- NWP 49 - Coal Remining Activities
- NWP 50 - Underground Coal Mining Activities
- NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 13 – Bank Stabilization
- NWP 14 – Linear Transportation Projects
- NWP 40 – Agricultural Activities
- NWP 41 – Reshaping Existing Drainage Ditches
- NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit

natural resources in the designated area, the following NWP's may be used to authorize activities within these areas:

- NWP 3 – Maintenance
- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 12 – Utility Line Activities
- NWP 14 – Linear Transportation Projects
- NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
- NWP 30 – Moist Soil Management for Wildlife
- NWP 37 – Emergency Watershed Protection and Rehabilitation
- NWP 40 – Agricultural Activities
- NWP 41 – Reshaping Existing Drainage Ditches
- NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWP's may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

- NWP 3 – Maintenance
- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 12 – Utility Line Activities
- NWP 13 – Bank Stabilization
- NWP 14 – Linear Transportation Projects
- NWP 18 – Minor Discharges
- NWP 19 – Minor Dredging
- NWP 33 – Temporary Construction, Access, and Dewatering
- NWP 40 – Agricultural Activities
- NWP 41 – Reshaping Existing Drainage Ditches
- NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWP's may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

- NWP 3 - Maintenance
- NWP 7 - Outfall Structures and Associated Intake Structures
- NWP 12 - Utility Line Activities
- NWP 13 - Bank Stabilization
- NWP 14 - Linear Transportation Projects
- NWP 18 - Minor Discharges
- NWP 19 - Minor Dredging
- NWP 33 - Temporary Construction, Access, and Dewatering

NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 25 - Structural Discharges
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or, under exceptional

circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

(1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.

(2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.

c) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

- a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.
- b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.
- c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).
- d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).
- e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected

and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.

f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.

g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.

h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed

within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWP's, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP's. While no blanket WQC was issued for Hawaii for the 2007 NWP's, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP's, which we found to be reasonable and not result in a denial of any one or number of NWP's for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWPs in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWPs at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWPs 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWPs at this time. Accordingly, the NWPs are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI. .

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 36 (Boat Ramps)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 36, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

No waters were excluded from the use of NWP 36.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.2 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use

upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWPs, it was fashioned from numerous categories of activities

authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWPs.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the

course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Indian Tribes

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project

manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.

(t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. Regional General Permits authorized 81 floating docks in Hawaii Kai Marina and repeated maintenance dredging of Pearl Harbor on the Island of Oahu. Letters of Permission authorized 100+ day-use mooring buoys in the state of Hawaii and a handful of scientific measuring buoys throughout the POH AOR. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

(a) Substrate: Boat ramp construction in navigable waters of the United States will alter the substrate of those waters, by removing and/or covering the upper layers of that substrate. This may change the physical, chemical, and biological characteristics of the substrate. RC 5 prohibits the placement of temporary fills from dredging upon the substrate. Higher rates of erosion or sediment suspension may result during construction, but general condition 12 requires the use of appropriate measures to control soil erosion and sediment.

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

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

(d) Current patterns and water circulation: Same as discussed in the national decision document.

(e) Normal water level fluctuations: Same as discussed in the national decision document.

(f) Salinity gradients: Same as discussed in the national decision document.

(g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if

necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as

storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required. .

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized 3 actions using the NWP considered in this document during the past five years, impacting a total of .08 acres. POH estimates that this NWP may be used approximately 2 times per year, anticipating approximately 0.3 acres of impact to waters of the United States in the next five years. For these unavoidable impacts to waters of the U.S., review under this NWP on a case-by-case basis will determine whether compensatory mitigation will be required. We have no scientific evidence, anecdotal or empirical, to suggest the temporary impact to 0.3 acres of waters of the U.S. will result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 36

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

NWP 21 - Surface Coal Mining Activities
NWP 29 - Residential Developments
NWP 34 - Cranberry Production Activities
NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities

NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWP's may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures

NWP 12 - Utility Line Activities

NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges

NWP 25 - Structural Discharges

NWP 40 - Agricultural Activities

NWP 41 - Reshaping Existing Drainage Ditches

NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWP's in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 30, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWP's within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation or, under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the

Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.

h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration

techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which

generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWPs, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWPs. While no blanket WQC was issued for Hawaii for the 2007 NWPs, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWPs, which we found to be reasonable and not result in a denial of any one or number of NWPs for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWPs in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. Accordingly, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 37 (Emergency Watershed Protection and Rehabilitation)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 37, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.5 Proposed Regional Condition 6 – Road Crossings

As discussed in 2.2.1 above, RC 6 was created to incorporate the “Use of Embedded or Bottomless Arch Culverts” advisory found in the February 18, 2011 PN and to better inform the public as to its applicability to many NWPs. The resource agencies’ comments were reasonable for minimizing impacts to the aquatic environment and are enforceable. Accordingly, they were

included in the RC. Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

3.1.1 National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas

RC 1 restricts this NWP from use in National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas because they have particular environmental or ecological significance. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If

the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWPs, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWPs.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other

available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any N.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what

types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to “flag” applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.

- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest

portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

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

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

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

(d) Current patterns and water circulation: Same as discussed in the national decision document.

(e) Normal water level fluctuations: Same as discussed in the national decision document.

(f) Salinity gradients: Same as discussed in the national decision document.

(g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and

standard Best Management Practices be applied to all projects proposed for authorization under the NWP.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of

NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required. .

- (6) Riffle and pool complexes: Same as discussed in the national decision document.
- (k) Municipal and private water supplies: Same as discussed in the national decision document.
- (l) Recreational and commercial fisheries: Same as discussed in the national decision document.
- (m) Water-related recreation: Same as discussed in the national decision document.
- (n) Aesthetics: Same as discussed in the national decision document.
- (o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized 1 action using the NWP considered in this document during the past five years, with recorded impacts of 0.4 acres to waters of the U.S. from 1 action in FY 2009. POH anticipates an increase in the number of projects seeking authorization under this NWP as government agencies further discussions regarding an overarching, watershed approach to assessing cumulative impacts that may influence program regulations and policy. Estimating that this NWP may be used approximately 1 times per year, the POH anticipates approximately 2.0 acres (using the 0.4 acre per year figure from FY 2010) of impact to waters of the United States in the next five years. For these unavoidable impacts to waters of the U.S., review under this NWP on a case-by-case basis will determine whether compensatory mitigation will be required. We have no scientific evidence, anecdotal or empirical, to suggest the temporary impact to 2.0 acres of waters of the U.S. will result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of

the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 3

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

- NWP 21 - Surface Coal Mining Activities
- NWP 29 - Residential Developments
- NWP 34 - Cranberry Production Activities
- NWP 39 - Commercial and Institutional Developments
- NWP 42 - Recreational Activities
- NWP 44 - Mining Activities
- NWP 49 - Coal Remining Activities
- NWP 50 - Underground Coal Mining Activities
- NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 13 – Bank Stabilization
- NWP 14 – Linear Transportation Projects
- NWP 40 – Agricultural Activities
- NWP 41 – Reshaping Existing Drainage Ditches
- NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam

marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWP's may be used to authorize activities within these areas:

- NWP 3 – Maintenance
- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 12 – Utility Line Activities
- NWP 14 – Linear Transportation Projects
- NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
- NWP 30 – Moist Soil Management for Wildlife
- NWP 37 – Emergency Watershed Protection and Rehabilitation
- NWP 40 – Agricultural Activities
- NWP 41 – Reshaping Existing Drainage Ditches
- NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWP's may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

- NWP 3 – Maintenance
- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 12 – Utility Line Activities
- NWP 13 – Bank Stabilization
- NWP 14 – Linear Transportation Projects
- NWP 18 – Minor Discharges
- NWP 19 – Minor Dredging
- NWP 33 – Temporary Construction, Access, and Dewatering
- NWP 40 – Agricultural Activities
- NWP 41 – Reshaping Existing Drainage Ditches
- NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWP's may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

- NWP 3 - Maintenance
- NWP 7 - Outfall Structures and Associated Intake Structures
- NWP 12 - Utility Line Activities
- NWP 13 - Bank Stabilization
- NWP 14 - Linear Transportation Projects
- NWP 18 - Minor Discharges

NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 25 - Structural Discharges
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly

encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWPs: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of

project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.

b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.

c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.

- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.
- i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.
- j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.
- k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.).

Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting “Impaired Waters” as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill’s acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes “...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste.” The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

10.4 Regional Condition 6 – Road Crossings

For any activity authorized under NWP 3, 14, 27, 37, 40, 41, or 45, use of embedded or bottomless arch culverts is required when practicable, especially where frequent culvert maintenance or replacement is needed. Culverts must maintain the original and natural full bank capacity (cross-sectional volume) of the channel.

If a bottomless culvert cannot be used, a rock apron with an appropriate slope (determined on a site or project specific basis), or other appropriate measures must be incorporated to prevent perching of the culvert or scouring that could obstruct up- and downstream native stream species migration. To preserve a natural stream bed, bridge designs that span the stream or river, including pier or pile supported spans, are encouraged.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWP's, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP's. While no blanket WQC was issued for Hawaii for the 2007 NWP's, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP's, which we found to be reasonable and not result in a denial of any one or number of NWP's for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the

NWPs at this time. Accordingly, the NWPs are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI. .

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 38 (Cleanup of Hazardous and Toxic Waste)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 38, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

No waters were excluded from the use of NWP 38.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.2 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWP, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWP.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be

notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try and resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.

- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical

habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that

remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required. .

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized no actions using the NWP considered in this document during the past five years. Based on anecdotal evidence and the lack of past authorizations under this NWP, POH expects no to minimal usage, and therefore, no minimal effects that would result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 3

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

- NWP 21 - Surface Coal Mining Activities
- NWP 29 - Residential Developments
- NWP 34 - Cranberry Production Activities
- NWP 39 - Commercial and Institutional Developments
- NWP 42 - Recreational Activities
- NWP 44 - Mining Activities

NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging

NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 25 - Structural Discharges
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWP in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation or, under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

(1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.

(2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.

(3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that

provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species.

The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

- i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.
- j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.
- k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).
- l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.
- m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:
<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

- a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement

by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting “Impaired Waters” as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill’s acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes “...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste.” The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland

location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWP's, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP's. While no blanket WQC was issued for Hawaii for the 2007 NWP's, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP's, which we found to be reasonable and not result in a denial of any one or number of NWP's for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. Accordingly, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI. .

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 40 (Agricultural Activities)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 40, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 3 – Acreage Limitation

We originally proposed grouping all areas of POH AOR together under the same acreage limits. This would increase acreage limits in Guam, CNMI, and American Samoa to 1/3rd acre from 1/10th acre.

FWS questioned whether the proposed increase in allowable maximum losses was based on any cumulative impacts within POH. It believes the proposed increase could result in substantial and unacceptable impacts to aquatic resources of national importance and would continue to add to the cumulative losses throughout the Pacific Islands.

NOAA and EPA requested reinstatement of the previous 1/10th acre limit which was based on the small scale and uniqueness of aquatic resources in American Samoa and the Marianas archipelago. DOH supports lowering the allowable acreage of fill in Hawaii to 1/10th acre to make Hawaii consistent with Guam, CNMI, and American Samoa.

All areas within the POH AOR have very limited special aquatic sites, and reducing the area of fill authorized under the NWP will minimize impacts to those sites. A review of POH records indicates that the lower acreage will not result in significantly higher workload for the Corps and will improve consistency across the POH AOR. The 1/10th acre limit is adopted.

We removed NWP 29, 39, and 42, as these are on the list of NWP prohibited in the POH AOR, and have added NWP 51 because we agree that activities authorized by this new NWP could involve the discharge of dredged or fill material in waters of the U.S. and, accordingly, should fall under the acreage limitation or be reviewed through the more in-depth procedure of an Individual Permit.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.5 Proposed Regional Condition 4 – Length Limitation

This was originally called RC 4 (Length Limitation) in the February 18, 2011 PN and we originally proposed a statement that the 200 linear foot limit could be exceeded if the district engineer waives this limit by making a written determination that any discharges will result in minimal impacts to the aquatic environment.

NOAA, EPA and FWS recommended (in subsequent face-to-face meetings) that any waiver be supported by baseline stream data with the appropriate analysis of impacts to the aquatic environment. DOH requested keeping the original language without the possibility of a waiver.

A requirement to provide baseline stream data would put an unnecessary burden on applicants beyond that intended for submittal of PCNs for verification under the NWP. However, we have no data or other information indicating the 200 linear foot limit has unduly restricted use of the NWP; therefore, we will not include the waiver provision in this RC.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.6 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.7 Proposed Regional Condition 6 – Road Crossings

As discussed in 2.2.1 above, RC 6 was created to incorporate the “Use of Embedded or Bottomless Arch Culverts” advisory found in the February 18, 2011 PN and to better inform the public as to its applicability to many NWP. The resource agencies’ comments were reasonable for minimizing impacts to the aquatic environment and are enforceable. Accordingly, they were included in the RC. Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

3.1.1 Kihei Wetlands

Due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts, RC 1 restricts this NWP from being used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west. Instead, when taking place in this area, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.2 National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas

RC 1 restricts this NWP from use in National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas because they have particular environmental or ecological significance. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.3 Anchialine pools, montane bogs, natural freshwater lakes and saline lakes

Due to the uniqueness and rareness of these types of habitats in POH AOR, RC 1 restricts this NWP from use in anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.4 Mangroves and Sea and Freshwater Caves

RC 1 restricts this NWP from being used to authorize activities in mangroves or sea or freshwater caves in Guam, American Samoa (AS), and the Commonwealth of the Northern

Mariana Islands (CNMI). Mangroves provide extremely important functions for natural shoreline protection and aquatic species nursery grounds, and sea and freshwater caves are considered unique habitats. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.5 Stream Modification

RC 1 restricts this NWP from being used within POH to authorize permanent stream channelization or construction of dams that impound waters of the United States.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWP General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWP, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWP.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect

determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not

have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to “flag” applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a

review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.

- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The

remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.

(g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts

will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

- (6) Riffle and pool complexes: Same as discussed in the national decision document.
- (k) Municipal and private water supplies: Same as discussed in the national decision document.
- (l) Recreational and commercial fisheries: Same as discussed in the national decision document.
- (m) Water-related recreation: Same as discussed in the national decision document.
- (n) Aesthetics: Same as discussed in the national decision document.
- (o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized no actions using the NWP considered in this document during the past five years. Based on anecdotal evidence and the lack of past authorizations under this NWP, POH expects no to minimal usage, and therefore, no minimal effects that would result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 3

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

NWP 21 - Surface Coal Mining Activities
NWP 29 - Residential Developments
NWP 34 - Cranberry Production Activities
NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities

NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWP's may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures

NWP 12 - Utility Line Activities

NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges

NWP 25 - Structural Discharges

NWP 40 - Agricultural Activities

NWP 41 - Reshaping Existing Drainage Ditches

NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWP's in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWP's within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana

common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.

h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration

techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which

generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 3 – Acreage Limitation

The maximum acreage loss of waters of the United States for the total project may not exceed 1/10-acre resulting from any discharge of dredged or fill material in a special aquatic site, including wetlands if authorized by the following NWP, or a combination of any of these NWPs:

- NWP 3 - Maintenance
- NWP 7 - Outfall Structures and Associated Intake Structures
- NWP 40 - Agricultural Activities
- NWP 41 - Reshaping Existing Drainage Ditches
- NWP 43 - Stormwater Management Facilities
- NWP 45 - Repair of Uplands Damaged by Discrete Events
- NWP 46 - Discharges in Ditches
- NWP 51 - Land-Based Renewable Energy Generation Facilities

10.4 Regional Condition 4 – Length Limitation

Any discharge of dredged or fill material in any stream, including intermittent and ephemeral streams, may not exceed 200 linear feet if authorized by the following NWPs:

- NWP 12 - Utility Line Activities
- NWP 13 - Bank Stabilization
- NWP 14 - Linear Transportation Projects
- NWP 40 - Agricultural Activities
- NWP 45 - Repair of Uplands Damaged by Discrete Events
- NWP 46 - Discharges in Ditches
- NWP 51 - Land-Based Renewable Energy Generation Facilities

10.5 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

10.6 Regional Condition 6 – Road Crossings

Use of embedded or bottomless arch culverts is required when practicable, especially where frequent culvert maintenance or replacement is needed, for any activity authorized under the following NWP:

NWP 3 - Maintenance

NWP 14 - Linear Transportation Projects

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

NWP 37 - Emergency Watershed Protection and Rehabilitation

NWP 40 - Agricultural Activities

NWP 41 - Reshaping Existing Drainage Ditches

NWP 45 - Repair of Uplands Damaged by Discrete Events

Culverts must maintain the original and natural full bank capacity (cross-sectional volume) of the channel. If a bottomless culvert cannot be used, a rock apron with an appropriate slope (determined on a site or project specific basis), or other appropriate measures must be incorporated to prevent perching of the culvert or scouring that could obstruct up- and downstream native stream species migration. To preserve a natural stream bed, bridge designs that span the stream or river, including pier or pile supported spans, are encouraged.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWPs, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWPs. While no blanket WQC was issued for Hawaii for the 2007 NWPs, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWPs, which we found to be reasonable and not result in a denial of any one or number of NWPs for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. Accordingly, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI. .

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 41 (Reshaping Existing Drainage Ditches)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 41, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively..

2.2.4 Proposed Regional Condition 3 – Acreage Limitation

We originally proposed grouping all areas of POH AOR together under the same acreage limits. This would increase acreage limits in Guam, CNMI, and American Samoa to 1/3rd acre from 1/10th acre.

FWS questioned whether the proposed increase in allowable maximum losses was based on any cumulative impacts within POH. It believes the proposed increase could result in substantial and unacceptable impacts to aquatic resources of national importance and would continue to add to the cumulative losses throughout the Pacific Islands.

NOAA and EPA requested reinstatement of the previous 1/10th acre limit which was based on the small scale and uniqueness of aquatic resources in American Samoa and the Marianas archipelago. DOH supports lowering the allowable acreage of fill in Hawaii to 1/10th acre to make Hawaii consistent with Guam, CNMI, and American Samoa.

All areas within the POH AOR have very limited special aquatic sites, and reducing the area of fill authorized under the NWP will minimize impacts to those sites. A review of POH records indicates that the lower acreage will not result in significantly higher workload for the Corps and will improve consistency across the POH AOR. The 1/10th acre limit is adopted.

We removed NWP 29, 39, and 42, as these are on the list of NWP prohibited in the POH AOR, and have added NWP 51 because we agree that activities authorized by this new NWP could involve the discharge of dredged or fill material in waters of the U.S. and, accordingly, should fall under the acreage limitation or be reviewed through the more in-depth procedure of an Individual Permit.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.5 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters

subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.6 Proposed Regional Condition 6 – Road Crossings

As discussed in 2.2.1 above, RC 6 was created to incorporate the “Use of Embedded or Bottomless Arch Culverts” advisory found in the February 18, 2011 PN and to better inform the public as to its applicability to many NWPs. The resource agencies’ comments were reasonable for minimizing impacts to the aquatic environment and are enforceable. Accordingly, they were included in the RC. Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

3.1.1 Kihei Wetlands

Due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts, RC 1 restricts this NWP from being used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west. Instead, when taking place in this area, activities that would otherwise be authorized by this NWP will be required to

undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.2 National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas

RC 1 restricts this NWP from use in National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas because they have particular environmental or ecological significance. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.3 Anchialine pools, montane bogs, natural freshwater lakes and saline lakes

Due to the uniqueness and rareness of these types of habitats in POH AOR, RC 1 restricts this NWP from use in anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.4 Mangroves and Sea and Freshwater Caves

RC 1 restricts this NWP from being used to authorize activities in mangroves or sea or freshwater caves in Guam, American Samoa (AS), and the Commonwealth of the Northern Mariana Islands (CNMI). Mangroves provide extremely important functions for natural shoreline protection and aquatic species nursery grounds, and sea and freshwater caves are considered unique habitats. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.5 Stream Modification

RC 1 restricts this NWP from being used within POH to authorize permanent stream channelization or construction of dams that impound waters of the United States.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWP could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered

species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWPs, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its

design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWP.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWP was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an "Effect" determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further

consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try and resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.

(t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service,

National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local

maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat. .

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of

organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized no actions using the NWP considered in this document during the past five years. Based on anecdotal evidence and the lack of past authorizations under this NWP, POH expects no to minimal usage, and therefore, no minimal effects that would result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 3

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

- NWP 21 - Surface Coal Mining Activities
- NWP 29 - Residential Developments
- NWP 34 - Cranberry Production Activities
- NWP 39 - Commercial and Institutional Developments
- NWP 42 - Recreational Activities
- NWP 44 - Mining Activities

NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges

NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 25 - Structural Discharges
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant

communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

- i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.
- j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.
- k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).
- l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.
- m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWPs do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:
<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

- a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated

into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 3 – Acreage Limitation

The maximum acreage loss of waters of the United States for the total project may not exceed 1/10-acre resulting from any discharge of dredged or fill material in a special aquatic site,

including wetlands if authorized by the following NWPs, or a combination of any of these NWPs:

- NWP 3 - Maintenance
- NWP 7 - Outfall Structures and Associated Intake Structures
- NWP 40 - Agricultural Activities
- NWP 41 - Reshaping Existing Drainage Ditches
- NWP 43 - Stormwater Management Facilities
- NWP 45 - Repair of Uplands Damaged by Discrete Events
- NWP 46 - Discharges in Ditches
- NWP 51 - Land-Based Renewable Energy Generation Facilities

10.4 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

10.5 Regional Condition 6 – Road Crossings

Use of embedded or bottomless arch culverts is required when practicable, especially where frequent culvert maintenance or replacement is needed, for any activity authorized under the following NWPs:

- NWP 3 - Maintenance
- NWP 14 - Linear Transportation Projects
- NWP 27 - Aquatic Habitat Restoration, Establishment, and Enhancement Activities
- NWP 37 - Emergency Watershed Protection and Rehabilitation
- NWP 40 - Agricultural Activities
- NWP 41 - Reshaping Existing Drainage Ditches
- NWP 45 - Repair of Uplands Damaged by Discrete Events

Culverts must maintain the original and natural full bank capacity (cross-sectional volume) of the channel. If a bottomless culvert cannot be used, a rock apron with an appropriate slope (determined on a site or project specific basis), or other appropriate measures must be incorporated to prevent perching of the culvert or scouring that could obstruct up- and downstream native stream species migration. To preserve a natural stream bed, bridge designs that span the stream or river, including pier or pile supported spans, are encouraged.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these documents were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWP's, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP's. While no blanket WQC was issued for Hawaii for the 2007 NWP's, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP's, which we found to be reasonable and not result in a denial of any one or number of NWP's for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the

NWPs at this time. Accordingly, the NWPs are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI. .

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 43 (Stormwater Management Facilities)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 43, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 3 – Acreage Limitation

We originally proposed grouping all areas of POH AOR together under the same acreage limits. This would increase acreage limits in Guam, CNMI, and American Samoa to 1/3rd acre from 1/10th acre.

FWS questioned whether the proposed increase in allowable maximum losses was based on any cumulative impacts within POH. It believes the proposed increase could result in substantial and unacceptable impacts to aquatic resources of national importance and would continue to add to the cumulative losses throughout the Pacific Islands.

NOAA and EPA requested reinstatement of the previous 1/10th acre limit which was based on the small scale and uniqueness of aquatic resources in American Samoa and the Marianas archipelago. DOH supports lowering the allowable acreage of fill in Hawaii to 1/10th acre to make Hawaii consistent with Guam, CNMI, and American Samoa.

All areas within the POH AOR have very limited special aquatic sites, and reducing the area of fill authorized under the NWP will minimize impacts to those sites. A review of POH records indicates that the lower acreage will not result in significantly higher workload for the Corps and will improve consistency across the POH AOR. The 1/10th acre limit is adopted.

We removed NWP 29, 39, and 42, as these are on the list of NWP prohibited in the POH AOR, and have added NWP 51 because we agree that activities authorized by this new NWP could involve the discharge of dredged or fill material in waters of the U.S. and, accordingly, should fall under the acreage limitation or be reviewed through the more in-depth procedure of an Individual Permit.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.5 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters

subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

3.1.1 Kihei Wetlands

Due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts, RC 1 restricts this NWP from being used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west. Instead, when taking place in this area, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.2 National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas

RC 1 restricts this NWP from use in National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas because they have particular environmental or ecological significance. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be

required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.3 Anchialine pools, montane bogs, natural freshwater lakes and saline lakes

Due to the uniqueness and rareness of these types of habitats in POH AOR, RC 1 restricts this NWP from use in anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.1.4 Mangroves and Sea and Freshwater Caves

RC 1 restricts this NWP from being used to authorize activities in mangroves or sea or freshwater caves in Guam, American Samoa (AS), and the Commonwealth of the Northern Mariana Islands (CNMI). Mangroves provide extremely important functions for natural shoreline protection and aquatic species nursery grounds, and sea and freshwater caves are considered unique habitats. Accordingly, when taking place in these areas, activities that would otherwise be authorized by this NWP will be required to undergo the more in-depth review associated with the Individual Permit (IP) application review process.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently,

these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used

if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWPs, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWPs.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions

that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect* or *May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff’s time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone

conference on 1 December 2011. They were concerned on how the NWP would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to “flag” applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try and resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural,

or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.

- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure

on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

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

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

- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

- (h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.
- (i) Other wildlife: Same as discussed in the national decision document.
- (j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23

requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWP.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the

aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWP for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required. .

- (6) Riffle and pool complexes: Same as discussed in the national decision document.
- (k) Municipal and private water supplies: Same as discussed in the national decision document.
- (l) Recreational and commercial fisheries: Same as discussed in the national decision document.
- (m) Water-related recreation: Same as discussed in the national decision document.
- (n) Aesthetics: Same as discussed in the national decision document.
- (o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized no actions using the NWP considered in this document during the past five years. Based on anecdotal evidence and the lack of past authorizations under this NWP, POH expects no to minimal usage, and therefore, no minimal effects that would result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect

jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 3

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

- NWP 21 - Surface Coal Mining Activities
- NWP 29 - Residential Developments
- NWP 34 - Cranberry Production Activities
- NWP 39 - Commercial and Institutional Developments
- NWP 42 - Recreational Activities
- NWP 44 - Mining Activities
- NWP 49 - Coal Remining Activities
- NWP 50 - Underground Coal Mining Activities
- NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 13 – Bank Stabilization
- NWP 14 – Linear Transportation Projects
- NWP 40 – Agricultural Activities
- NWP 41 – Reshaping Existing Drainage Ditches
- NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

- NWP 3 – Maintenance
- NWP 7 – Outfall Structures and Associated Intake Structures

NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures

NWP 12 - Utility Line Activities

NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges

NWP 25 - Structural Discharges

NWP 40 - Agricultural Activities

NWP 41 - Reshaping Existing Drainage Ditches

NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered

Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-

256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands

etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.

g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.

h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:
<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 3 – Acreage Limitation

The maximum acreage loss of waters of the United States for the total project may not exceed 1/10-acre resulting from any discharge of dredged or fill material in a special aquatic site, including wetlands if authorized by the following NWP, or a combination of any of these NWPs:

- NWP 3 - Maintenance
- NWP 7 - Outfall Structures and Associated Intake Structures
- NWP 40 - Agricultural Activities
- NWP 41 - Reshaping Existing Drainage Ditches
- NWP 43 - Stormwater Management Facilities
- NWP 45 - Repair of Uplands Damaged by Discrete Events
- NWP 46 - Discharges in Ditches
- NWP 51 - Land-Based Renewable Energy Generation Facilities

10.4 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal

communication that it was the Department's intent to issue a blanket certification for approximately 7 NWP's, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP's. While no blanket WQC was issued for Hawaii for the 2007 NWP's, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP's, which we found to be reasonable and not result in a denial of any one or number of NWP's for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. Accordingly, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI. .

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic

environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 45
(Repair of Uplands Damaged by Discrete Events)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 45, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 3 – Acreage Limitation

We originally proposed grouping all areas of POH AOR together under the same acreage limits. This would increase acreage limits in Guam, CNMI, and American Samoa to 1/3rd acre from 1/10th acre.

FWS questioned whether the proposed increase in allowable maximum losses was based on any cumulative impacts within POH. It believes the proposed increase could result in substantial and unacceptable impacts to aquatic resources of national importance and would continue to add to the cumulative losses throughout the Pacific Islands.

NOAA and EPA requested reinstatement of the previous 1/10th acre limit which was based on the small scale and uniqueness of aquatic resources in American Samoa and the Marianas archipelago. DOH supports lowering the allowable acreage of fill in Hawaii to 1/10th acre to make Hawaii consistent with Guam, CNMI, and American Samoa.

All areas within the POH AOR have very limited special aquatic sites, and reducing the area of fill authorized under the NWPs will minimize impacts to those sites. A review of POH records indicates that the lower acreage will not result in significantly higher workload for the Corps and will improve consistency across the POH AOR. The 1/10th acre limit is adopted.

We removed NWPs 29, 39, and 42, as these are on the list of NWPs prohibited in the POH AOR, and have added NWP 51 because we agree that activities authorized by this new NWP could involve the discharge of dredged or fill material in waters of the U.S. and, accordingly, should fall under the acreage limitation or be reviewed through the more in-depth procedure of an Individual Permit.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.5 Proposed Regional Condition 4 – Length Limitation

This was originally called RC 4 (Length Limitation) in the February 18, 2011 PN and we originally proposed a statement that the 200 linear foot limit could be exceeded if the district engineer waives this limit by making a written determination that any discharges will result in minimal impacts to the aquatic environment.

NOAA, EPA and FWS recommended (in subsequent face-to-face meetings) that any waiver be supported by baseline stream data with the appropriate analysis of impacts to the aquatic environment. DOH requested keeping the original language without the possibility of a waiver.

A requirement to provide baseline stream data would put an unnecessary burden on applicants beyond that intended for submittal of PCNs for verification under the NWP. However, we have no data or other information indicating the 200 linear foot limit has unduly restricted use of the NWP; therefore, we will not include the waiver provision in this RC.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.6 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.7 Proposed Regional Condition 6 – Road Crossings

As discussed in 2.2.1. above, RC 6 was created to incorporate the “Use of Embedded or Bottomless Arch Culverts” advisory as it was originally called in the February 18, 2011 PN and to better inform the public as to its applicability to many NWP. The resource agencies’ comments were incorporated reasonable for minimizing impacts to the aquatic environment and are enforceable. When repairing or replacing road crossings involving previously authorized fill or structures, the RC condition is applicable to reduce possible impacts to the aquatic environment.

2.2.8 Proposed Regional Condition 7 – Bank Stabilization

This was originally labeled RC 5 (Bank Stabilization) in the February 18, 2011 PN. In the PN, POH proposed allowing the use of rigid structures if the district engineer made a written determination that such structures would be preferred for purposes of preventing sedimentation impacts to adjacent receiving waters.

We reworded this RC to clarify that it could be waived if the district engineer has made a written determination that the structure would not result in more than minimal impacts to the aquatic environment and downstream channel stability and would minimize sedimentation impacts to adjacent receiving waters.

NOAA, EPA and FWS recommended (in subsequent face-to-face meetings) that the waiver be supported by baseline stream data with the appropriate analysis of impacts to the aquatic environment. A requirement to provide baseline stream data would put an unnecessary burden on applicants beyond that intended for submittal of PCNs for verification under the NWP. We believe the “appropriate analysis of impacts to the aquatic environment” falls within the best professional judgment of the POH Regulatory staff in determining if the minimal impacts threshold is exceeded. We will not include this baseline stream data requirement in the RC.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

No waters were excluded from the use of NWP 45.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.2 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWP could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under this NWP have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project

managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWPs, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species,

then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWP.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect* or *May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWP was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an "Effect" determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further

consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of all work proposed under ANY NWP, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs prohibit projects if it is determined that it may affect properties, listed or eligible for listing, in the NRHP until the requirements of Section 106 of the NHPA have been satisfied. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.

(t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service,

National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has provided, and will continue to provide, appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local

maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of

organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required. .

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized 3 actions using the NWP considered in this document during the past five years, with recorded impacts of 0.04 acres over 100 linear feet to waters of the U.S. POH estimates that this NWP may be used approximately one time per year, anticipating approximately 0.25 acres of impact to waters of the United States in the next five years (using 100 linear feet by 20' wide average for the repair of uplands). This number, however, is purely speculative as it is completely dependent upon the number of 'events'. As the POH AOR is within a tectonically active area of the earth's crust, earthquakes are frequent. The area is also tropical, ensuring frequent heavy rain events, with subsequent flash-flooding. These rain events may or may not accompany hurricanes and typhoons. Due to the geographical uniqueness of the island masses in the POH AOR, i.e., steepness of the watersheds and short distance between mountain tops and ocean shorelines, the likelihood of the need for use of this NWP is high. For these unavoidable impacts to waters of the U.S., review under this NWP on a case-by-case basis will determine whether compensatory mitigation will be required. We have no scientific evidence, anecdotal or empirical, to suggest the impact to 1.0 acre or up to 5.0 acres (in extreme periods) of waters of the U.S. will result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 45

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

NWP 21 - Surface Coal Mining Activities
NWP 29 - Residential Developments
NWP 34 - Cranberry Production Activities
NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities

NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWP's may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures

NWP 12 - Utility Line Activities

NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges

NWP 25 - Structural Discharges

NWP 40 - Agricultural Activities

NWP 41 - Reshaping Existing Drainage Ditches

NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWP's in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWP's within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation or, under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana

common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.

- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.
- i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.
- j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.
- k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).
- l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.
- m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration

techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

- a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All special conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification. The special conditions are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.
- b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.
- c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:
 - (1) Identify the waterbody as an Impaired Water; and
 - (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.
- d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which

generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 3 – Acreage Limitation

For any discharge of dredged or fill material in a special aquatic site, including wetlands, authorized by NWP 3, 7, 40, 41, 43, 45, 46, or 51, or a combination of any of these NWPs, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/10-acre.

10.4 Regional Condition 4 – Length Limitation

Any discharge of dredged or fill material in any stream bed, including intermittent and ephemeral streams, authorized by NWP 12, 13, 14, 40, 45, 46, or 51 may not exceed 200 linear feet.

10.5 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

10.6 Regional Condition 6 – Road Crossings

For any activity authorized under NWP 3, 14, 27, 37, 40, 41, or 45, use of embedded or bottomless arch culverts is required when practicable, especially where frequent culvert maintenance or replacement is needed. Culverts must maintain the original and natural full bank capacity (cross-sectional volume) of the channel. If a bottomless culvert cannot be used, a rock apron with an appropriate slope (determined on a site or project specific basis), or other appropriate measures must be incorporated to prevent perching of the culvert or scouring that could obstruct up- and downstream native stream species migration. To preserve a natural stream bed, bridge designs that span the stream or river, including pier or pile supported spans, are encouraged.

10.7 Regional Condition 7 – Bank Stabilization

For NWPs 13 (Bank Stabilization), 14 (Linear Transportation Projects), 27 (Aquatic Habitat Restoration, Establishment, and Enhancement Activities), and 45 (Repair of Uplands Damaged by Discrete Events), rigid structures such as pre-cast concrete, concrete rubble masonry, and

cast-in-place structures may not be used for bank stabilization unless the district engineer waives this exclusion by making a written determination concluding that the structures will result in minimal adverse effects to the aquatic environment and downstream channel stability and will minimize sedimentation impacts to adjacent receiving waters.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWP's, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP's. While no blanket WQC was issued for Hawaii for the 2007 NWP's, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP's, which we found to be reasonable and not result in a denial of any one or number of NWP's for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35,

36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. Accordingly, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI. .

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 46 (Discharges in Ditches)

This document is a supplement to the national decision document for Nationwide Permit (NWP) 46, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 3 – Acreage Limitation

We originally proposed grouping all areas of POH AOR together under the same acreage limits. This would increase acreage limits in Guam, CNMI, and American Samoa to 1/3rd acre from 1/10th acre.

FWS questioned whether the proposed increase in allowable maximum losses was based on any cumulative impacts within POH. It believes the proposed increase could result in substantial and unacceptable impacts to aquatic resources of national importance and would continue to add to the cumulative losses throughout the Pacific Islands.

NOAA and EPA requested reinstatement of the previous 1/10th acre limit which was based on the small scale and uniqueness of aquatic resources in American Samoa and the Marianas archipelago. DOH supports lowering the allowable acreage of fill in Hawaii to 1/10th acre to make Hawaii consistent with Guam, CNMI, and American Samoa.

All areas within the POH AOR have very limited special aquatic sites, and reducing the area of fill authorized under the NWPs will minimize impacts to those sites. A review of POH records indicates that the lower acreage will not result in significantly higher workload for the Corps and will improve consistency across the POH AOR. The 1/10th acre limit is adopted.

We removed NWPs 29, 39, and 42, as these are on the list of NWPs prohibited in the POH AOR, and have added NWP 51 because we agree that activities authorized by this new NWP could involve the discharge of dredged or fill material in waters of the U.S. and, accordingly, should fall under the acreage limitation or be reviewed through the more in-depth procedure of an Individual Permit.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.5 Proposed Regional Condition 4 – Length Limitation

This was originally called RC 4 (Length Limitation) in the February 18, 2011 PN and we originally proposed a statement that the 200 linear foot limit could be exceeded if the district engineer waives this limit by making a written determination that any discharges will result in minimal impacts to the aquatic environment.

NOAA, EPA and FWS recommended (in subsequent face-to-face meetings) that any waiver be supported by baseline stream data with the appropriate analysis of impacts to the aquatic environment. DOH requested keeping the original language without the possibility of a waiver.

A requirement to provide baseline stream data would put an unnecessary burden on applicants beyond that intended for submittal of PCNs for verification under the NWP. However, we have no data or other information indicating the 200 linear foot limit has unduly restricted use of the NWPs; therefore, we will not include the waiver provision in this RC.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.6 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

No waters were excluded from the use of NWP 46.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.2 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, RC 2 requires submittal of a PCN prior to the use of any NWP in the Honolulu District.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under NWP 8 have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of the activities eligible for NWP 48 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWP, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWP.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be

notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.

- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical

habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat. .

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform

chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required. .

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized no actions using the NWP considered in this document during the past five years. Based on anecdotal evidence and the lack of past authorizations under this NWP, POH expects no to minimal usage, and therefore, no minimal effects that would result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 3

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

- NWP 21 - Surface Coal Mining Activities
- NWP 29 - Residential Developments
- NWP 34 - Cranberry Production Activities

NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities

NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 25 - Structural Discharges
NWP 40 - Agricultural Activities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be

downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan

(HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.

i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.

j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.

k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue

verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 3 – Acreage Limitation

The maximum acreage loss of waters of the United States for the total project may not exceed 1/10-acre resulting from any discharge of dredged or fill material in a special aquatic site, including wetlands if authorized by the following NWPs, or a combination of any of these NWPs:

- NWP 3 - Maintenance
- NWP 7 - Outfall Structures and Associated Intake Structures
- NWP 40 - Agricultural Activities
- NWP 41 - Reshaping Existing Drainage Ditches
- NWP 43 - Stormwater Management Facilities
- NWP 45 - Repair of Uplands Damaged by Discrete Events
- NWP 46 - Discharges in Ditches
- NWP 51 - Land-Based Renewable Energy Generation Facilities

10.4 Regional Condition 4 – Length Limitation

Any discharge of dredged or fill material in any stream, including intermittent and ephemeral streams, may not exceed 200 linear feet if authorized by the following NWPs:

- NWP 12 - Utility Line Activities
- NWP 13 - Bank Stabilization
- NWP 14 - Linear Transportation Projects
- NWP 40 - Agricultural Activities
- NWP 45 - Repair of Uplands Damaged by Discrete Events
- NWP 46 - Discharges in Ditches
- NWP 51 - Land-Based Renewable Energy Generation Facilities

10.5 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWPs, those used most frequently in the State of Hawaii. That process would

not begin until publication of the Federal Register notice announcing the Final NWP. While no blanket WQC was issued for Hawaii for the 2007 NWP, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP, which we found to be reasonable and not result in a denial of any one or number of NWP for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWP at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP at this time. Accordingly, the NWP are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI.

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the

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

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

13.0 Final Determination

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

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 48 (Commercial Shellfish Aquaculture Activities)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 48, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management

Practices (BMPs)". It also contained the "Definition of Coral Reefs". Our February 18, 2011 PN proposed keeping these two advisories and eliminating the "Definition of Coral Reefs".

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the "Use of Embedded or Bottomless Arch Culverts" advisory into it as the advisory was specific to only certain NWP's and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWP's. We also incorporated the resource agencies' comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for "Site-Specific Best Management Practices (BMPs)" and a Regional Condition for "Standard Best Management Practices" and have combined the two into RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the "Definition of Coral Reefs" to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWP's.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWP's 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWP's 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWP's 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP's due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWP's 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWP's 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWP's 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWP's in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWP's require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWP's have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN))

and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWPs and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in

these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWP in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

No waters were excluded from the use of NWP 48.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, all NWPs will require submittal of a PCN to POH.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under NWP 8 have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent usage of NWP 8 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened

or endangered species. The 2012 NWP's General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWP's, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an "Effect" determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWP's.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an "Effect" determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a

coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff's time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais. POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to "flag" applications for NWP or any other permit types, and informed them of the

Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into

consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: Same as discussed in the national decision document.
- (e) Wetlands: Same as discussed in the national decision document.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.

- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor

discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.

(g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above and in the national decision document, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Division Engineer has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, Regional Condition 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands; however, since this NWP does not authorize additional work outside

the footprint of the original structure, except to incorporate new technologies, these impacts will be minimal. Some wetlands may be temporarily impacted by the work when used as temporary staging areas.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the

District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required. .

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on information extracted from POH Regulatory Branch internal database, this district has authorized no actions using the NWP considered in this document during the past five years. Based on anecdotal evidence and the lack of past authorizations under this NWP, POH expects no to minimal usage, and therefore, no minimal effects that would result in a significant cumulative or greater than minimal adverse impact.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe

that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 3

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

NWP 21 - Surface Coal Mining Activities
NWP 29 - Residential Developments
NWP 34 - Cranberry Production Activities
NWP 39 - Commercial and Institutional Developments
NWP 42 - Recreational Activities
NWP 44 - Mining Activities
NWP 49 - Coal Remining Activities
NWP 50 - Underground Coal Mining Activities
NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

NWP 7 – Outfall Structures and Associated Intake Structures
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWPs may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWPs may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects

NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWPs may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWPs may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef.

No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures

NWP 12 - Utility Line Activities

NWP 14 - Linear Transportation Projects

NWP 18 - Minor Discharges

NWP 25 - Structural Discharges

NWP 40 - Agricultural Activities

NWP 41 - Reshaping Existing Drainage Ditches

NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWPs within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach

fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

- (1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.
- (2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.
- (3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected

would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

- a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.
- b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.
- c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.
- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.

- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.
- i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.
- j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.
- k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.). Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).
- l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.
- m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result

in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:
<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

- a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.
- b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.
- c. For projects directly impacting "Impaired Waters" as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:
 - (1) Identify the waterbody as an Impaired Water; and
 - (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.
- d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill's acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling

and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes "...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste." The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these documents were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWP's, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP's. While no blanket WQC was issued for Hawaii for the 2007 NWP's, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP's, which we found to be reasonable and not result in a denial of any one or number of NWP's for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQCs. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing. .

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP at this time. Accordingly, the NWP are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI. .

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 51
(Land-Based Renewable Energy Generation Facilities)**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 51, and addresses the regional modifications and conditions for this NWP. The Pacific Ocean Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Honolulu District issued a public notice on February 18, 2011. The issuance of the NWPs was announced in the February 21, 2012 Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Honolulu District considered the need for regional conditions for this NWP. The Honolulu District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No general comments were received in response to our public notice.

2.2 Comments on Proposed Regional Advisories and Regional Conditions

Thirteen Regional Conditions (RCs) and two regional advisories were proposed by the Honolulu District (POH), which were detailed in the February 18, 2011 Public Notice (PN) (See Appendix A). As a result of comments received during the PN period, the POH proposed RCs were revised to include nine RCs and one advisory and a definition section (see Appendix B).

2.2.1 Proposed Regional Advisories

The Honolulu District (POH) 2007 Regional Conditions (RCs) contained two advisories; one for “Use of Embedded or Bottomless Arch Culverts” and one for “Site-Specific Best Management Practices (BMPs)”. It also contained the “Definition of Coral Reefs”. Our February 18, 2011 PN proposed keeping these two advisories and eliminating the “Definition of Coral Reefs”.

We removed this section as an advisory because it has potential impacts important enough to become a stand-alone RC. We have created a new RC (6 - Road Crossings) and incorporated the “Use of Embedded or Bottomless Arch Culverts” advisory into it as the advisory was specific to only certain NWP and we felt that by creating a new RC, the public would be better informed as to its applicability to those specific NWPs. We also incorporated the resource agencies’ comments as they are reasonable for minimizing impacts to the aquatic environment and are enforceable.

We also determined that there was no benefit realized in having both a Regional Advisory for “Site-Specific Best Management Practices (BMPs)” and a Regional Condition for “Standard Best Management Practices” and have combined the two into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), Sub-item 7 (Standard Best Management Practices (BMPs)). We have reworked the language to clarify that BMPs must include site-specific plans, as well as industry accepted standard BMPs, and both must be included in the application or pre-construction notification (PCN) submittal package. This action will result in less confusion on the part of applicants, a reduction in potential review time, and will ensure minimization of impacts to the aquatic environment.

Based on the overwhelming objections from the federal resource agencies to its removal, we have changed and relocated the “Definition of Coral Reefs” to the new definitions section at the end of the RCs as it was out of place in the Advisory Section and re-inserted a new Coral Reef Advisory. This is also our acknowledgement of the importance of this resource throughout the POH area of responsibility (AOR) and its applicability to all NWPs.

2.2.2 Proposed Regional Condition 1 – Exclusions

Based on coordination with the resource agencies, this regional condition was revised to seven categories of exclusions: revocations, two categories of geographic exclusions, three categories of resource-based exclusions, and one activity-based exclusion.

Revoked Permits. NWPs 21, 24, 34, 49, and 50 are revoked from use within the POH AOR as they pertain to activities that will not occur within the geographic region. NWPs 29, 39, 42, and 52 are revoked due to the high potential for greater than minimal impacts in the POH AOR given the limited land available for both development and any mitigation that would be required for authorized impacts occurring on each individual island.

Kihei Wetlands. NWPs 7, 13, 14, 40, 41, and 43 are excluded from use within the Kihei community on Maui, Hawaii due to the extensive historical cumulative losses of wetlands due to past development that have left inadequate tracts of land available for compensatory mitigation for future authorized impacts. Based on coordination with the resource agencies, these

categories of activities were considered to comprise those activities occurring most frequently within Kihei, Maui. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. These areas are excluded from use of NWP due to their operation and functioning as habitat for fish and wildlife trust resources. Under this RC NWPs 3, 7, 12, 14, 27, 30, 37, 40, 41, and 43 may be utilized in these areas by federal or state agencies whose proposed activities may benefit natural resources in the designated area.

Anchialine pools, montane bogs, natural freshwater lakes, and saline lakes. Based on coordination with the resource agencies, NWPs 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use within these features due to their rarity and their sensitivity to impacts within the POH AOR. Evaluation of impacts under the standard individual permit application review will allow POH project managers the opportunity to ensure authorized impacts are no more than minimal for such activities.

Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes in the Territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands. Based on coordination with the resource agencies, NWPs 3, 7, 12, 13, 14, 18, 19, 33, 40, 41, and 43 are excluded from use in these areas to provide POH project managers the opportunity to ensure minimal impact to these aquatic resources through the standard individual permit evaluation process.

Coral Reefs. Based on coordination with the federal resource agencies, POH will exclude from authorization under NWP any activity that results in a permanent, unavoidable loss of coral reef that requires compensatory mitigation to continuing threats to corals from land-based development activities, and direct construction and dredging impacts in marine waters.

Stream Modification. Due to extensive historical losses of stream habitat in the comparatively small watersheds throughout the POH AOR, NWPs 7, 12, 14, 18, 25, 40, 41, and 51 are excluded from use to authorize permanent stream channelization or construction of dams that impound waters of the United States. Restricting such activities to evaluation under the more rigorous standard individual permit process will ensure that POH project managers are able to ensure that impacts of such activities are minimal.

2.2.3 Proposed Regional Condition 2 - Regional Conditions that apply to all NWPs in the Honolulu District

This RC was originally called RC2 (Notification) in the February 18, 2011 PN. As written, not all of the NWPs require PCNs. We originally did not propose any changes to this RC; however, due to federal resource agency concern that all of the NWPs have the potential to impact threatened and endangered species, their habitat, coral reefs, and other special aquatic sites, we

have added the requirement of submitting a PCN for all of the NWP's. We have also added a condition requiring the permittee to advise the POH within seven days of commencement of authorized work to allow easier scheduling of inspections to ensure permit compliance. RC 2 is renamed to Regional Conditions that apply to all NWP's in the Honolulu District. The notification requirement is located at RC 2, sub-item 1 (Pre-Construction Notification (PCN)) and the 7 day notification is added in RC2, sub-item 2 (Notification of Commencement of an Authorized Activity). Applying this RC to this NWP will enable the Corps to review all activities authorized by this NWP to ensure they result in no more than minimal impacts to aquatic resources, individually or cumulatively.

Compensatory Mitigation. This was originally called RC 9 (Compensatory Mitigation) in the February 18, 2011 PN. We originally removed specific NWP numbers since this RC is applicable to all NWP's and changed the last sentence from, "...1:1 replacement for wetlands and other aquatic areas." to, "1:1 replacement of unavoidable aquatic resource function losses."

FWS recommended adding a statement to encourage using a metric to quantify resource function and service to reassure that appropriate mitigation is developed. NOAA and EPA recommended adding language to clarify that the mitigation ratio must account for temporal loss and uncertainty of success.

The Corps proposed the change in language to track the 2008 Mitigation Rule emphasis on replacement of aquatic resource function losses. We do not feel it necessary to add a statement regarding metrics to reassure ensure appropriate mitigation. The POH Regulatory project managers will ensure appropriate success metrics are included in any required mitigation plan. We agree to add a "Note" to clarify that mitigation ratios may exceed 1:1 in order to account for temporal losses and mitigation success uncertainty.

This section was moved to RC 2 (Regional Conditions that apply to all NWP's in the Honolulu District), sub-item 3 (Compensatory Mitigation). This sub-item of RC 2 will ensure activities authorized by this NWP do not have more than minimal impacts to aquatic resources by requiring that, consistent with the 2008 Mitigation Rule, any required compensatory mitigation focuses on the replacement of lost aquatic resources, that upland vegetation buffers are not used as the primary or sole method to offset permanent losses of aquatic resources within the POH AOR, and that any required compensatory mitigation provides a minimum of 1:1 replacement of unavoidable aquatic resource function losses.

Minimization Measures. This was originally called RC 10 (Mitigation Measures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA recommended changing the title from Mitigation Measures to Minimization Measures to reflect the actual purpose of the RC and adding subsection "c" to ensure authorized activities avoid coral reefs and seagrass beds. The State of Hawaii Department of Health, Clean Water Branch (DOH) recommended adding a statement indicating a preference for those species that provide or replace the same functions as those provided by the plants they are replacing. This will ensure functions impacting water quality, such as sediment filtration and/or nutrient uptake, are preserved after the authorized construction. We have incorporated EPA's and DOH's recommendations as they will minimize impacts to aquatic resources and water quality that could

result from work performed under this NWP. This RC has been relocated into RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 4 (Minimization Measures). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Site Identification. This was originally called RC 11 (Site Identification) in the February 18, 2011 PN and we proposed no changes to this item.

NOAA, EPA and FWS all recommended addition of the following sentence, “Such identification of project limits shall be properly maintained until construction is completed and the soils have been stabilized.”

This statement will serve to remind the contractors of the limits of construction which they should not exceed. Inclusion of this statement is reasonable as it may result in a reduction impacts to the aquatic resources and will further allow ease in identification of project limits by POH project managers conducting compliance visits.

This section was moved to RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 5 (Site Identification). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

Protected or Endangered Species. This was originally called RC 12 (Endangered Species) in the February 18, 2011 PN. We originally did not propose any changes to this RC. NOAA NMFS Protected Resources Division (PRD) and the FWS suggested changing the name from the 2007 RC title of “Endangered Species”, to reflect the breadth of protection offered by the Endangered Species Act (ESA). FWS and NOAA NMFS Habitat Conservation Division (HCD) requested adding language about the need for consideration of protected species that are sessile and unable to move away from construction areas. PRD recommended a rewrite of this section to make it more understandable to all applicants. We have altered the title and incorporated PRD’s recommended wording to clarify this condition. This requirement is now located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 6 (Protected or Endangered Species). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact, individually or cumulatively, to threatened or endangered species.

Standard Best Management Practices. This was originally called RC 13 (Standard Best Management Procedures) in the February 18, 2011 PN. We originally did not propose any changes to this RC. EPA, FWS, and NOAA NMFS HCD all proposed addition of a provision to address invasive species and their removal from equipment and materials. As stated above, we combined the 2007 Regional Advisory for “Site-Specific Best Management Practices (BMPs)” into this RC, now located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 7 (Standard Best Management Practices (BMPs)) to stress the need to address all BMPs “up front” for all PCNs applicable to each NWP. Applying this RC to this NWP will

ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

State of Hawaii Clean Water Branch Department of Health (DOH) Requirements. This RC informs applicants of the types of work that require a Section 401 Water Quality Certification (WQC) from DOH. It notifies applicants of their responsibility to: 1) obtain a Section 401 WQC when required; 2) identify Impaired Waters and minimize impacts from work proposed in these waters; 3) obtain a NPDES permit when required; and 4) properly dispose of any dredged spoils in accordance with DOH requirements. It also provides notice to applicants that all conditions of a 401 WQC are considered conditions of a DA permit. These requirements are located in RC 2 (Regional Conditions that apply to all NWPs in the Honolulu District), sub-item 8 (State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements). Applying this RC to this NWP will ensure that the activities authorized under this NWP have no more than a minimal impact on the aquatic environment, individually or cumulatively.

2.2.4 Proposed Regional Condition 3 – Acreage Limitation

We originally proposed grouping all areas of POH AOR together under the same acreage limits. This would increase acreage limits in Guam, CNMI, and American Samoa to 1/3rd acre from 1/10th acre.

FWS questioned whether the proposed increase in allowable maximum losses was based on any cumulative impacts within POH. It believes the proposed increase could result in substantial and unacceptable impacts to aquatic resources of national importance and would continue to add to the cumulative losses throughout the Pacific Islands.

NOAA and EPA requested reinstatement of the previous 1/10th acre limit which was based on the small scale and uniqueness of aquatic resources in American Samoa and the Marianas archipelago. DOH supports lowering the allowable acreage of fill in Hawaii to 1/10th acre to make Hawaii consistent with Guam, CNMI, and American Samoa.

All areas within the POH AOR have very limited special aquatic sites, and reducing the area of fill authorized under the NWPs will minimize impacts to those sites. A review of POH records indicates that the lower acreage will not result in significantly higher workload for the Corps and will improve consistency across the POH AOR. The 1/10th acre limit is adopted.

We removed NWPs 29, 39, and 42, as these are on the list of NWPs prohibited in the POH AOR, and have added NWP 51 because we agree that activities authorized by this new NWP could involve the discharge of dredged or fill material in waters of the U.S. and, accordingly, should fall under the acreage limitation or be reviewed through the more in-depth procedure of an Individual Permit.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.5 Proposed Regional Condition 4 – Length Limitation

This was originally called RC 4 (Length Limitation) in the February 18, 2011 PN and we originally proposed a statement that the 200 linear foot limit could be exceeded if the district engineer waives this limit by making a written determination that any discharges will result in minimal impacts to the aquatic environment.

NOAA, EPA and FWS recommended (in subsequent face-to-face meetings) that the waiver be supported by baseline stream data with the appropriate analysis of impacts to the aquatic environment. DOH requested keeping the original language without the possibility of a waiver.

A requirement to provide baseline stream data would put an unnecessary burden on applicants beyond that intended for submittal of PCNs for verification under the NWP. However, we have no data or other information indicating the 200 linear foot limit has unduly restricted use of the NWPs; therefore, we will not include the waiver provision in this RC.

For projects proposed under this NWP, NOAA and EPA also requested agency notification for all proposed waivers of the national 300' limit for intermittent and ephemeral aquatic resources. We believe the likelihood of exceeding the 300' national limit for NWPs 51 in the POH AOR is unlikely due to the geography of the islands. We do, however, believe the 200 linear foot limit in this RC should be applicable to any potential projects under this NWP and, until analysis of data from future permits demonstrates otherwise, this RC will apply to this NWP.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

2.2.6 Proposed Regional Condition 5 – Sidecasting

This was originally labeled RC 6 (Sidecasting) in the February 18, 2011 PN and we originally proposed no changes to this item.

FWS recommended no materials be allowed to be sidecast into waters in the POH AOR as sidecasting with no volume limits or containment can result in temporal and permanent impacts or loss of aquatic habitat. DOH requested we prohibit sidecasting into flowing waters or waters subject to tidal action as it is impossible to control impacts to water quality as a result of this practice. Furthermore, DOH recommend that sidecasting not be allowed if the dredged or excavated materials are contaminated.

We have removed NWP 41 (Reshaping Existing Drainage Ditches) from allowing sidecasting as there is a potential to cause permanent loss of aquatic habitat due to the fact that this material is normally required to be removed to an upland disposal site. NWP 12 (Utility Line Activities) verifications, on the other hand, are usually conditioned to require replacement of removed material into the trench, thereby eliminating the requirement for upland disposal and limiting the likelihood of permanent loss of aquatic habitat. Therefore, activities carried out under NWP 12 may still sidecast material into waters of the U.S. However, we agree that sidecasting in flowing waters or waters subject to tidal action could negatively impact water quality and will include

this prohibition for activities carried out under NWP 12. We also agree that dredging or excavation in areas where the material may be considered polluted could free up pollutants which may have been contained in those materials for dispersal into the aquatic environment. This could result in additional impacts to the aquatic environment. As such, we will add a statement prohibiting sidecasting of dredged material under NWP 12 if there is reason to believe these sediments may be contaminated. If an applicant wishes to sidecast material that the Corps or a federal resource agency believes could be contaminated, the applicant will be required to provide sediment testing to establish that the material is not contaminated.

Applying this RC to this NWP will ensure that activities authorized under this NWP result in no more than minimal impacts to the aquatic environment.

3.0 Waters Excluded from NWP or Subject to Additional PCN Requirements

3.1 Waters excluded from use of this NWP

RC 1 restricts NWP 51 from use within POH to authorize permanent stream channelization or construction of dams that impound waters of the United States. There are no other waters excluded from use of NWP 51.

3.2 Waters subjected to additional pre-construction notification requirements

As stated in 2.2.3 above, due to the potential to impact threatened and endangered species, their habitat, coral reefs and other special aquatic sites, all NWPs will require submittal of a PCN to POH.

4.0 Alternatives

4.1 No Regional Conditions

With no RCs, activities authorized under these NWPs could result in more than minimal impacts in some or all of the POH AOR. Further, without RCs, many proposed activities that could be authorized under these NWPs would not be subject to POH review and consequently subject to our discretionary authority to evaluate projects on a case-by-case basis to determine whether a more rigorous review would be warranted under a standard individual permit. Potential adverse effects may also include the introduction of invasive species, and a “Take” or harassment of protected and/or endangered species. As a result, there likely would be more than minimal adverse impacts, both individually and cumulatively to these important areas and aquatic features occurring within the Pacific region.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

A review of the POH regulatory databases indicates that the activities authorized under NWP 8 have resulted in minimal individual and cumulative impacts to waters of the U.S. Consequently, these data tend to suggest the proposed regional limits and notification thresholds are appropriate to ensure minimal adverse effects.

As discussed in Section 2.2.3 above, requiring a PCN for this NWP would provide POH project managers the ability to ensure impacts to special aquatic sites, such as coral reefs, are avoided and/or minimized.

4.3 Alternative Regional Nationwide Permit Conditions

Based on the historical infrequent authorization of activities that may be eligible for NWP 51 and the anticipated minimal impacts associated with this type of activity, the requirement for a submittal of a PCN for all usage of the NWP is reasonable and will allow POH project managers the opportunity to review and condition each activity to ensure its impacts are individually no more than minimal.

5.0 Endangered Species Act

5.1 General Considerations

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD and a standardized checklist has been developed for use upon initial review of the PCN/application to determine if the proposed work qualifies for inclusion in this agreement. If a project does not qualify for the Pac-SLOPES agreement, then the SOP described below is followed.

Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. Through meetings between FWS and POH, it was agreed that the POH project managers, when in doubt, would request a listing of species potentially impacted by the proposed work from the local FWS office. The POH project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect, but Not Likely to Adversely Affect* finding, use of a coordination letter between the POH and NOAA NMFS PRD and/or USFWS is used to request concurrence that determination. The POH project manager will document reasoning in a memorandum to the file for a *No Effect* determination, while a *May Affect, but Not Likely to Adversely Affect* finding requires the project manager create a Biological Evaluation (BE) to support that finding and to be transmitted with our letter to the agency requesting concurrence. Additional BMPs and/or conditions are typically provided by the PRD/FWS with their letters of concurrence, which are incorporated into POH verification letters to minimize impacts to these species.

Should the Effect determination yield a *Likely to Adversely Affect* or greater impact, then formal consultation would be initiated with the local NMFS PRD and/or FWS office. The district engineer may assert discretionary authority to require an individual permit for the proposed work and initiate consultation through the individual permit process; however, this would only be used if there is value added that compensates for the added workload due to processing more IPs. If the consultation is conducted under the nationwide permit process without the district asserting discretionary authority to require an individual permit, then the applicant must be notified that the activity cannot be verified under the NWP until all ESA requirements have been satisfied. If

the district determines that the activity would have no effect on any endangered species, then the district could proceed to issue the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to threatened or endangered species. The 2012 NWPs General Condition 18 prohibits projects if it is determined they may directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for listing as threatened or endangered. In addition, NOAA NMFS PRD and U.S. FWS both contributed substantially to development of RC 2, sub-item 6 for additional safeguards involving protected and endangered species.

5.2 Local Operating Procedures for Endangered Species

POH has a Pacific Standard Local Operating Procedures for Endangered Species (Pac-SLOPES) agreement with NOAA NMFS PRD which was finalized in August 2010 after approximately 18 months of regular meetings and discussions between the two agencies and development of a Biological Evaluation on the effects of implementing such an agreement. While the Pac-SLOPES are not specific to the NWPs, it was fashioned from numerous categories of activities authorized by the NWP. Standard Operating Procedures for POH require a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to threatened or endangered species. A standardized checklist has been developed for use upon initial review of the PCN/application to assist the project manager in determining whether the type of project may qualify for inclusion in the Pac-SLOPES agreement. The project manager will make an “Effect” determination taking into consideration the scale of the project and its design. If the Effect determination is *May Affect but Not Likely to Adversely Affect* a species, then POH uses a coordination letter to NOAA NMFS PRD to request concurrence with our Effect determination with implementation of Pac-SLOPES. NOAA NMFS PRD may respond via Email with their concurrence. The Pac-SLOPES agreement includes a series of General Conditions, Special Conditions, and BMPs jointly developed to be reasonable, enforceable, and resulting in a minimization of impacts to the species identified in the area. Such an agreement greatly reduces workload on the part of the POH project managers by enabling use of the NWPs.

While FWS has expressed an interest in a Pac-SLOPES agreement for species under its jurisdiction, it has not provided the necessary commitment to required resources of time and manpower to develop such an agreement with POH.

6.0 National Historic Preservation Act

6.1 Local Operating Procedures for National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies consult with the State Historic Preservation Office (SHPO) and Native Hawaiian Organizations (NHOs) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other

available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Effect* finding, then no further consultation is required. If the Effect determination yields a *May Affect or May Adversely Affect* finding, consultation with SHPO and the Office of Hawaiian Affairs (OHA) is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. Recommendations provided by SHPO or OHA are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeologic.

7.0 Consultation with Native Hawaiian Organizations

7.1 Summary of the Consultation Process

An advance notice of the soon-to-be-published Federal Register announcing the proposed 2012 NWPs was sent out to the Office of Hawaiian Affairs (OHA) and other Native Hawaiian Organizations (NHOs) on 17 December 2010. A request to initiate consultation letter was sent out to these same addressees on 11 February 2011 and a personal Email invitation sent to Dr. Pua Aiu, Director of the State Historic Preservation Division. We received consultation requests from Dr. Aiu and the Daughters of Hawaii.

Dr. Aiu was joined in consultation by Mr. Keola Lindsey of the OHA. Their concerns were not specific to any NWP, but regarded the individual review process that POH conducts. They indicated there was no likelihood of written comments addressing the Regional conditions or any blanket Section 106 Effect Determinations and any requests for comments and concurrences on DA permits will be considered on a case-by-case basis and availability of the staff and the staff’s time.

Ms. Dale Bachman and Ms. Shannon Wilson did not respond to our request for time and location for the consultation, but completed consultation with POH Regulatory staff via telephone conference on 1 December 2011. They were concerned on how the NWPs would be applicable to Nuuanu Stream and Reservoir and the associated `auwai. They wanted to be able to have their input considered for water level volume releases from the reservoir and how it would impact their `auwais. POH staff explained what was covered under the Corps jurisdiction and what types of activities would be covered under the NWP related to the stream, reservoir, and auwais.

POH staff explained how reinforcement of the reservoir under NWP 3 may be authorized, as well as repair or replacement of the water control structure, but reiterated to them how we do not have any jurisdiction over the release of water from the reservoir. POH staff explained that we have no way to “flag” applications for NWP or any other permit types, and informed them of the Public Notice procedures for larger projects. POH staff asked if they wanted to be on the Public Notice notification list; that way, if something was proposed for their areas of interest, then they would be notified prior to a permit being issued and would be notified of the opportunity to comment on any large projects proposed for Nuuanu Stream and Reservoir. They were satisfied with this consultation and felt their concerns had been addressed.

7.2 Local Operating Procedures for Protecting Native Hawaiian Resources

Regulations at 33 CFR Part 325 Appendix C requires federal agencies consult with Native Hawaiian Organizations (NHOs) and/or the State Historic Preservation Office (SHPO) on all actions that may adversely affect historic, religious, or cultural sites. Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a DA permit for any potential impacts to these sites within the Area of Potential Effect (APE). The POH project manager will review the Hawaii and National Register of Historic Places (NRHP) on-line and any other available resources to make an “Effect” determination, taking into consideration the scale of the project, its design, and any possible impacts to possible historic, religious, or cultural sites. If the determination results in a *No Potential to Cause Effects* finding, then no further consultation is required. If the Effect determination yields a *No Effect or No Adverse Effect, or Adverse Effect* finding, consultation with the Office of Hawaiian Affairs (OHA) and/or SHPO is required. This typically occurs in the form of a coordination letter containing our Effect findings and soliciting comments from federal and state resource agencies. The POH must wait 30 days to obtain concurrence, if no consulting party has objected. If the OHA or SHPO has disagreed with the determination, the POH will consult to try to resolve the disagreement or request an opinion from the Advisory Council on Historic Preservation. Recommendations provided by the OHA, SHPO, or the ACHP are typically incorporated as special conditions of the NWP verification. In cases where a proposed project *May Affect* a site, formal consultation may be initiated, resulting in Memorandum of Agreement as to steps that must be taken to satisfy the requirements of the NHPA. If this occurs, then the applicant must be notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to NHPA protected sites. General Condition (GC) 20 of the 2012 NWPs requires activities determined to affect properties, listed or eligible for listing, in the NRHP to satisfy the requirements of Section 106 of the NHPA before they may be authorized by NWP. Additionally, GC 21 addresses the course of action which must be taken in situations where previously unknown historic, cultural, or archeological remains and artifacts are discovered in the process of performing work authorized by any NWP.

8.0 Essential Fish Habitat

The Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act require federal agencies consult with NMFS on all actions that may adversely affect essential fish habitat (EFH). Standard Operating Procedures (SOP) for POH involves a review of the PCN/application for a Department of the Army (DA) permit for any potential impact to EFH. The POH project manager will make an “Effect” determination taking into consideration the scale of the project, its design, and any possible impacts to EFH. If the determination results in a *No Effect* to EFH or a *Will Not Adversely Affect* finding, then no further consultation is required. If the Effect determination yields a *May Adversely Affect* finding, consultation with NOAA NMFS HCD is required. POH incorporates applicable and enforceable EFH Conservation Recommendations provided by NOAA NMFS as special conditions of the NWP verification.

RC 2 requires notification to POH of work proposed under all NWPs, thereby allowing POH project managers the opportunity to review all proposed work for potential impacts to EFH. In addition, NOAA NMFS contributed to development of the proposed Regional Conditions.

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Honolulu District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

(a) Conservation: The activities authorized by this NWP may modify the natural resource characteristics of the project area. Compensatory mitigation, if required for activities authorized by this NWP, will result in the restoration, enhancement, establishment, or preservation of aquatic habitats that will offset losses of conservation values; however, due to the limited size of the islands within POH AOR, there is limited amount of land available for development associated with this NWP and for construction of mitigation sites. The adverse effects of activities authorized by this NWP on conservation will be minor.

(b) Economics: Same as discussed in the national decision document.

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

(d) General environmental concerns: Activities authorized by this NWP will affect general environmental concerns, such as water, air, noise, and land pollution. The authorized work will also affect the physical, chemical, and biological characteristics of the environment. The adverse effects of the activities authorized by this NWP on general environmental concerns will be minor. Adverse effects to the chemical composition of the aquatic environment will be controlled by general condition 6, which states that the material used for construction must be free from toxic pollutants in toxic amounts. General condition 23 requires mitigation to minimize adverse effects to the aquatic environment through avoidance and minimization at the project site. Compensatory mitigation may be required by district engineers to ensure that the

net adverse effects on the aquatic environment are minimal; however, due to the limited size of the islands within POH AOR, there is limited amount of land available for development associated with this NWP and for construction of mitigation sites. It is important to note that the Corps scope of review is usually limited to impacts to aquatic resources. Specific environmental concerns are addressed in other sections of this document.

(e) Wetlands: Activities authorized by this NWP may result in the destruction of wetlands. This NWP does not authorize activities in tidal wetlands or in non-tidal wetlands adjacent to tidal waters. In most cases, the affected wetlands will be permanently filled, especially where buildings, roads, utilities, and other permanent fills are located, resulting in the permanent loss of aquatic resource functions and values. Wetlands may also be converted to other uses and habitat types. Some areas of the development will be graded and filled to install lawns and ornamental plants, which will replace the wetlands in those areas. Some wetlands may be temporarily impacted by the work through the use of temporary staging areas and access roads. These wetlands will be restored, unless the district engineer authorizes another use for the area, but the plant community may be different, especially if the site was originally forested. For most activities requiring notification, compensatory mitigation will be required to offset the loss of wetlands and ensure that the adverse effects to the aquatic environment are minimal; however, due to the limited size of the islands within POH AOR, there is limited amount of land available for development associated with this NWP and for construction of mitigation sites.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required by district engineers to ensure that the net adverse effects on the aquatic environment are minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. Division engineers can regionally condition this NWP to restrict or prohibit the use of this NWP in high value non-tidal wetlands. District engineers will also exercise discretionary authority to require an individual permit if the wetlands to be filled are high value and the work will result in more than minimal adverse effects on the aquatic environment. District engineers can also add case-specific special conditions to the NWP authorization to provide protection to wetlands or require compensatory mitigation to offset losses of wetlands.

- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)

The permit area within the POH AOR is unique in that it involves numerous geographically isolated archipelagos across a vast area of Pacific Ocean. Each island within each island group, i.e., the Hawaiian and Northwest Hawaiian Islands, Guam, CNMI, and American Samoa is isolated from each other. The POH AOR is expansive, but the areas of cumulative effects are limited to a small percentage of that area or number of islands. This is due to the fact that many islands are not populated at all or only sparsely populated, making cumulative effects negligible on those islands. The NOAA Office of Ocean and Coastal Resource Management website states that Guam, American Samoa, CNMI and Hawaii have 110, 126, 250, and 1,052 miles of coast, respectively. The USFWS National Wetland Inventory (NWI) maps estimate that approximately 105,222 acres of the State of Hawaii is comprised of wetlands. Using NWI maps, the Guam Department of Parks and Recreation estimated a total of 14,000 acres of wetlands occurred on Guam. Likewise, the American Samoa Department of Parks and Recreation used surveys by USFWS to estimate 240 acres of wetlands exist on American Samoa. No published figures could be found on acreages of wetlands on the CNMI.

According to figures available from the 2010 U.S. Census, the population of Hawaii, Guam, American Samoa, and CNMI have increased 33%, 60%, 95%, and 260%, respectively, between 1980 and 2006. In Hawaii, 70% of the population growth has been on Oahu and on CNMI, 90% has been on Saipan, with the remaining 10% split between Tinian and Rota. A nearly 20% population increase is anticipated on Guam within the next five years due to the U.S. military's proposed relocation of U.S. troops from Okinawa to Guam. Population growth will likely continue at relatively unabated rates on all the islands within the POH AOR, increasing pressure on currently uninhabited or sparsely populated areas and their natural resources. The largest portion of this development will be in areas outside of Corps jurisdiction; however, indirect effects can be expected.

During the past five years, requests for maintenance of existing fill and/or structures comprised over 35%, utility line activities comprised 12%, scientific measurement devices comprised 11%, linear transportation projects comprised 10%, survey activities comprised 8%, and bank stabilization projects comprised 7% of the authorizations under the NWP program. The remaining 17% of the authorizations under the NWP program included the following: minor discharges and/or dredging; removal of vessels; temporary construction, access and dewatering; fish and wildlife harvesting, enhancement, and attraction devices and activities; aquatic habitat restoration, establishment, and enhancement activities; boat ramps; maintenance of existing flood control facilities; repair of uplands damaged by discreet events; emergency watershed protection and rehabilitation; and outfall structures and associated intake structures. It is anticipated that, with the increased population expected, particularly on Guam, requests for utility line projects and linear transportation projects will likely increase in the next five years. As these needs increase, so will energy consumption, likely resulting in a use of this NWP.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on reduction, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment which will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide

appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

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

(a) Substrate: Discharges of dredged or fill material into waters of the United States will alter the substrate of those waters, usually replacing the aquatic area with dry land, and changing the physical, chemical, and biological characteristics of the substrate. The original substrate will be removed or covered by other material, such as concrete, asphalt, soil, gravel, etc. Temporary fills may be placed upon the substrate, but must be removed upon completion of the work (see general condition 13). Higher rates of erosion may result during construction, but general condition 12 requires the use of appropriate measures to control soil erosion and sediment. RC 5 prohibits sidecasting in any water of the U.S., therefore, temporary fill impacts will be minimized.

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

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

(d) Current patterns and water circulation: Same as discussed in the national decision document.

(e) Normal water level fluctuations: Same as discussed in the national decision document.

(f) Salinity gradients: Same as discussed in the national decision document.

(g) Threatened and endangered species: In addition to the safeguards discussed in the national decision document for this NWP, POH has established procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the district engineer determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. POH utilizes maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional Condition 2 requires notification for all NWPs in order to allow regulatory staff the opportunity to verify whether activities occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make an effects determination.

Based on the safeguards discussed above, especially general condition 18 and the NWP regulations at 33 CFR 330.5(f), the Corps has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as discussed in the national decision document.

(i) Other wildlife: Same as discussed in the national decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments, National Estuarine Research Reserves, and state-designated outstanding national resource waters. In addition, RC 1 prohibits use of the NWPs in the Hanalei River on Kauai (the only American Heritage River within POH AOR), National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. General condition 23 requires permittees mitigate in order to ensure that adverse effects on the aquatic environment are minimal. Further, RC 2, sub-item 7 requires project-specific and standard Best Management Practices be applied to all projects proposed for authorization under the NWPs.

(2) Wetlands: The activities authorized by this NWP may result in the destruction of wetlands. Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

Wetlands are a relatively rare ecosystem in POH due to the geography of the islands, i.e., volcanic mountains and the short distances between mountaintop and ocean shoreline. General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse effects on the aquatic environment are minimal; however, land area is limited for development and on which to complete mitigation if it involves wetland creation or establishment. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. The Honolulu District engineer may also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the work and the work will result in more than minimal adverse effects on the aquatic environment. The Honolulu District engineer can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(3) Mud flats: Same as discussed in the national decision document.

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

(5) Coral reefs: The activities authorized by this NWP may affect coral reefs. Every island making up the POH AOR has a significant amount of coral resources. The activities authorized by this NWP will have minimal adverse effects on coral reefs as RC 2 requires pre-construction notification be submitted for all NWPs, so that the district engineer can review the proposed work and ensure that it results in minimal adverse effects. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Furthermore, RC1 excludes use of NWPs for any activity that directly results in a permanent, unavoidable loss of coral reef if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

(6) Riffle and pool complexes: Same as discussed in the national decision document.

(k) Municipal and private water supplies: Same as discussed in the national decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national decision document.

(m) Water-related recreation: Same as discussed in the national decision document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Because this is a new NWP, we are left to speculate on the potential future projects that may emerge and the potential impacts those projects may have on the aquatic ecosystems within the POH AOR. From a cumulative perspective, foreseeable future energy demands are likely to increase due to developmental pressure due to population increases throughout the POH AOR. For these unavoidable impacts to waters of the U.S., review under this NWP on a case-by-case basis will determine whether compensatory mitigation will be required.

RC 2 requires a pre-construction notification to the Corps. If needed/required coordination with appropriate resource agencies will occur for their input on avoidance, minimization and mitigation. These agencies include, but are not limited to: U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency (EPA), State of Hawaii Department of Health, Department of Land and Natural Resources, State of Hawaii Office of Planning, Guam EPA, American Samoa Government, the Commonwealth of the

Northern Mariana Islands Division of Environmental Quality, and the Commonwealth of the Northern Mariana Islands, Office of the Governor, Coastal Resources Management. Review and technical input by these agencies and entities help to ensure the cumulative effects resulting from the work authorized under this NWP for any discharges of dredged or fill material into waters of the U.S. and/or work in Section 10 navigable waters of the U.S. are adequately considered and meaningfully addressed, whenever applicable.

By using the applicable Regional Conditions, the Honolulu District believes impacts to the aquatic environment will be minimized and does not believe compensatory mitigation will be required to offset the authorized losses of waters of the United States. From a cumulative perspective, we predict that, based on likely foreseeable future projects that could affect jurisdictional waters of the U.S., the use of this NWP will continue to result in cumulative effects to the aquatic environment but that those cumulative effects will remain minimal. We believe that the implementation of standard best management practices (BMPs) and applicable RCs has and will continue to provide appropriate measures to ensure the individual and cumulative impacts on the aquatic environment are minimal.

10.0 List of Final Corps Regional Conditions for NWP 51

10.1 Regional Condition 1 – Exclusions

1. Revoked Permits. The following NWPs may not be used to authorize activities within the geographic areas subject to the regulatory jurisdiction of the Honolulu District:

- NWP 21 - Surface Coal Mining Activities
- NWP 29 - Residential Developments
- NWP 34 - Cranberry Production Activities
- NWP 39 - Commercial and Institutional Developments
- NWP 42 - Recreational Activities
- NWP 44 - Mining Activities
- NWP 49 - Coal Remining Activities
- NWP 50 - Underground Coal Mining Activities
- NWP 52 - Water-Based Renewable Energy Generation Pilot Projects

2. Kihei Wetlands. The following NWPs may not be used to authorize activities on the island of Maui, Hawaii, within the area bounded by Mokulele Highway to the north, Kilohana Drive to the south, Piilani Highway to the east, and extending to the Pacific Ocean to the west:

- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 13 – Bank Stabilization
- NWP 14 – Linear Transportation Projects
- NWP 40 – Agricultural Activities
- NWP 41 – Reshaping Existing Drainage Ditches
- NWP 43 – Stormwater Management Facilities

3. National Wildlife Refuges, Hawaii State Wildlife Sanctuaries, Hawaii Marine Life Conservation Districts, and Guam Marine Preserve Areas. NWP's may not be used to authorize any activity within, or directly affecting, national wildlife refuges, Hawaii state wildlife sanctuaries, Hawaii marine life conservation districts, or Guam marine preserve areas, including wetlands adjacent to such designated areas. However, if the applicant is a federal or state resource agency whose proposed activity may benefit natural resources in the designated area, the following NWP's may be used to authorize activities within these areas:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 14 – Linear Transportation Projects
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
NWP 30 – Moist Soil Management for Wildlife
NWP 37 – Emergency Watershed Protection and Rehabilitation
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

4. Anchialine pools, montane bogs, natural freshwater lakes and saline lakes. The following NWP's may not be used to authorize activities within anchialine pools, montane bogs, natural freshwater lakes, or saline lakes:

NWP 3 – Maintenance
NWP 7 – Outfall Structures and Associated Intake Structures
NWP 12 – Utility Line Activities
NWP 13 – Bank Stabilization
NWP 14 – Linear Transportation Projects
NWP 18 – Minor Discharges
NWP 19 – Minor Dredging
NWP 33 – Temporary Construction, Access, and Dewatering
NWP 40 – Agricultural Activities
NWP 41 – Reshaping Existing Drainage Ditches
NWP 43 – Stormwater Management Facilities

5. Mangroves and Sea and Freshwater Caves, including Vadose Shafts, Sink Holes, Allogenic Streams, Stream Caves, Phreatic Zones, and Cenotes, in the Territories of Guam and American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). The following NWP's may not be used to authorize any activity in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands (CNMI) within mangroves or sea or freshwater caves, including vadose shafts, sink holes, allogenic streams, stream caves, phreatic zones, and cenotes:

NWP 3 - Maintenance
NWP 7 - Outfall Structures and Associated Intake Structures

NWP 12 - Utility Line Activities
NWP 13 - Bank Stabilization
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 19 - Minor Dredging
NWP 33 - Temporary Construction, Access, and Dewatering
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 43 - Stormwater Management Facilities

6. Coral Reefs. As defined at 40 CFR 230.44, coral reefs consist of the skeletal deposit, usually of calcareous or siliceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. No activity that directly results in a permanent, unavoidable loss of coral reef may be authorized by NWP if the District Engineer determines, after coordinating with federal resource agencies, that compensatory mitigation is required.

7. Stream Modification. The following NWPs may not be used to authorize permanent stream channelization or the construction of dams that impound waters of the United States:

NWP 7 - Outfall Structures and Associated Intake Structures
NWP 12 - Utility Line Activities
NWP 14 - Linear Transportation Projects
NWP 18 - Minor Discharges
NWP 25 - Structural Discharges
NWP 40 - Agricultural Activities
NWP 41 - Reshaping Existing Drainage Ditches
NWP 51 - Land-Based Renewable Energy Generation Facilities

10.2 Regional Condition 2 – Regional Conditions that apply to all NWPs in the Honolulu District

1. Pre-Construction Notification (PCN). Notification to the Honolulu District is required, in accordance with General Condition 31, for any activity permitted by NWP that will take place within the geographic areas subject to the regulatory jurisdiction of the Honolulu District. You must obtain a written NWP verification from the Honolulu District before commencing the authorized activity.

2. Notification of Commencement of an Authorized Activity. Notification to the Honolulu District of the commencement of any authorized activity is required within 7 days of commencement of the activity. Notification may be sent to: U.S. Army Corps of Engineers, Honolulu District, Attn: CEPOH-EC-R, Building 230, Fort Shafter, Hawaii 96858-5440 or via Email to CEPOH-EC-R@usace.army.mil. The notification must include the File Number as a reference.

3. Compensatory Mitigation. Upland vegetation buffers must not be used as the primary or sole method to offset permanent losses of wetland and aquatic areas authorized under any of the NWP's within all geographic areas under the Regulatory jurisdiction of the Honolulu District. Use of vegetated upland buffers is strongly encouraged however, as part of a compensatory mitigation plan that replaces lost aquatic resource functions through restoration, enhancement, creation, or under exceptional circumstances, preservation of wetland and aquatic areas. Compensatory mitigation shall provide a minimum ratio of 1:1 replacement of unavoidable aquatic resource function losses or area. (Note: The actual ratio may be larger in order to account for the impact plus temporal loss of area/functions and/or uncertainty of mitigation success).

4. Minimization Measures. A plan employing the techniques listed below must be implemented to avoid or minimize disturbance to wetlands, riparian areas and beach fringes and/or to re-establish vegetation in such areas when disturbance cannot be avoided. Areas disturbed during project construction shall be revegetated as soon as possible. Erosion protection shall be provided and maintained until the soil is permanently stabilized.

a. Avoidance and minimization techniques may vary with site conditions and include, but are not limited to, the following:

(1) Planning construction access and scheduling work to avoid or minimize damage to wetland vegetation.

(2) Using crane matting or suitable geotextile material to protect vegetation from damage by heavy equipment.

(3) Insuring that anchorage of construction barges, equipment, and their anchor lines avoid coral reefs and seagrass beds.

b. Revegetation techniques may vary with site conditions and include, but are not limited to seeding, planting, replacement of reserved ground cover, and/or fertilizing of re-contoured ground to promote re-establishment of natural plant communities. Species to be used for seeding and planting, preferably those that provide the same functions as those species they are replacing, shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state; 4) non-native non-invasive, species. Note: non-native species shall be used only when native species are not available. The following species are known to be highly invasive and shall not be used under any circumstances for revegetation under these NWP's: 1) species included on the USDA APHIS Plant Protection and Quarantine, Federal Noxious Weed List as of 6/7/99; 2) species included on the Hawaii Department of Agriculture, List of Plant Species Designated as Noxious Weeds for Eradication or Control Purposes (6/18/92); and 3) the University of Hawaii, Department of Botany, Distribution Maps of Alien Plants in Hawaii by island, Hawaiian Ecosystems at Risk (HEAR) Project (1/16/01); and 4) plants that score >1 and evaluated as 'Accept' on the Hawaii Weed Risk Assessment.

5. Site Identification. Prior to clearing and construction, project limits of authorized sites must be clearly identified in the field (e.g., by staking, flagging, silt fencing, buoys, existing footprint for maintenance activities, etc.) to ensure that impacts to waters of the U.S. (including wetlands) beyond project footprints are avoided. Such identification of project limits must be properly maintained until construction is completed and the soils have been stabilized.

6. Protected or Endangered Species

a. Constant vigilance shall be kept for the presence of protected species during all aspects of the proposed action. Protected species include plants and animals listed or proposed for listing as threatened or endangered under Endangered Species Act (ESA), birds covered under the Migratory Bird Conservation Act, as well as all marine mammals. Although the protected species potentially affected would be determined on a project-specific basis, protected species typically of concern in Hawaii include: Hawaiian stilt, Hawaiian coot, Hawaiian moorhen, Hawaiian duck, Hawaiian goose, green sea turtle, hawksbill sea turtle, and Hawaiian monk seal. In the Territory of Guam or the Commonwealth of the Northern Mariana Islands species include: nightingale wee-warbler, Mariana common moorhen, green sea turtle, and hawksbill sea turtle. In American Samoa species also include: green sea turtle and hawksbill sea turtle.

b. All on-site project personnel, irrespective of their employment arrangement or affiliation (e.g. employee, contractor, etc.), shall be apprised of the status of any protected species potentially present in the project area and the protections afforded to those species under Federal laws. Brochures explaining the laws and guidelines for listed species in Hawaii, American Samoa, and Guam may be downloaded from http://www.nmfs.noaa.gov/prot_res/MMWatch/hawaii.htm and <http://www.fws.gov/pacificislands/wesa/endspindex.html#Hawaiian>.

c. The project foreman shall designate an appropriate number of competent observers to survey the area adjacent to the proposed action for protected species. The project foreman shall also have in his/her possession at the jobsite a handout with photographs of protected species that may enter the construction site to assist with identification of the protected species. (U.S. Fish and Wildlife Service – Pacific Islands Fish and Wildlife Office (PIFWO) will provide the informational handout).

d. Surveys of the project area shall be made prior to the start of work each day, and prior to resumption of work following any break of more than one half hour, to ensure that no protected species are in the project area (typically within 50 yards of the proposed work). All work shall be postponed or halted when protected species are present, and shall only begin/resume after the animals have voluntarily departed the area. In the case of sessile species, a conservation plan shall be developed and approved between the Regulatory Branch, U.S. Army

Corps of Engineers and PIFWO and/or National Marine Fisheries Service Pacific Islands Regional Office (PIRO).

e. If an onsite protected species does not depart the area on its own for 3 days or more, we recommend that the permittee, or responsible contractor, contact PIFWO for further technical assistance and guidance (808) 792-9400.

f. Any interaction with or incidental take of protected species shall be reported immediately to the Regulatory Branch, U.S. Army Corps of Engineers (808) 438-9258. Additionally, pursuant to the ESA, any take of ESA-listed species (other than marine mammals) must be reported to the U.S. Fish and Wildlife Office of Law Enforcement in Honolulu at 1-808-861-8525. Any incidental take of marine mammals shall be reported immediately to NOAA's 24-hour hotline at 1-888-256-9840. Information reported must include the name and phone number of a point of contact, location of the incident, and nature of the take and/or injury.

Note: Additional requirements may be designated by the Honolulu District as appropriate for specific projects, including all conservation measures and/or BMPs required by any ESA consultation for the project.

7. Standard Best Management Practices (BMPs). Site-specific BMPs are generally a requirement of DA NWP verifications, either directly or by state water quality certification conditions, which are incorporated by reference. A permittee risks delays, or enforcement action if work is commenced pursuant to a site-specific BMP plan that includes regulated activities, such as temporary access fill or stream diversions, that were not authorized under the NWP verification. To facilitate efficient review of a project, site-specific BMPs must be submitted as part of the Pre-Construction Notification (PCN) required for any activity requiring authorization under a NWP.

To the extent applicable, the following BMPs must be implemented to minimize the degradation of water quality and impacts to fish, coral reefs, and other aquatic resources:

a. Turbidity and sediment from project-related work must be minimized and contained to the immediate vicinity of the authorized activity through the appropriate use of effective sediment containment devices.

b. To the extent practicable, the work must be conducted in the dry season or when any affected stream has minimal or no flow. The site must be stabilized to prevent erosion and runoff and work must stop during flooding, intense rainfall, storm surge, or high surf conditions. To the extent practicable, shoreline work must be done during low tides.

c. To the extent practicable, work in the aquatic environment must be scheduled to avoid coral spawning and recruitment periods and sea turtle nesting and hatching periods. Coordination with federal resource agencies (U.S. Fish and Wildlife Service and/or NOAA) can assist in identifying these time periods.

- d. Dredging and filling in the aquatic environment must be designed to avoid or minimize adverse impacts to or the loss of special aquatic sites (coral reefs, wetlands, riffle-pool complexes, etc.).
- e. All project-related materials (fill, landscaping, etc.) and equipment (dredges, barges, backhoes, etc.) to be placed in any aquatic environment shall be inspected and cleaned of pollutants, organic matter, and invasive species (including snakes, frogs, and marine plants and animals, etc.) prior to use.
- f. No project-related materials (fill, revetment rock, pipe etc.) shall be stockpiled in the aquatic environment (intertidal zones, reef flats, stream channels, wetlands etc.) or in close proximity such that materials could be carried into waters by wind, rain, or high surf.
- g. All construction debris and material removed from the marine/aquatic environment shall be disposed of at an approved upland or alternative disposal site.
- h. No contamination (by trash, debris, sediment, non-native species introductions, attractions of non-native pests, etc.) of adjacent waters of the U.S. including special aquatic sites, shall result from project-related activities. Special attention must be paid to the fouling level on barges, vessels, and equipment whereas to minimize the transport and potential introduction and spread of aquatic non-native species. In addition, if dredged or excavated material or structural members are removed from the water or placed in the water, measures must be taken to prevent the spread or introduction of any aquatic non-native species. This shall be accomplished by implementing a litter-control plan and on a site or project specific need basis, developing a Hazard Analysis and Critical Control Point Plan (HACCP – see <http://www.haccp-nrm.org/Wizard/default.asp>) to prevent attraction and introduction of non-native species.
- i. Fueling of project-related vehicles and equipment shall take place away from the water and a contingency plan to control petroleum products accidentally spilled during the project shall be developed. The plan shall be retained on site with the person charged with the responsibility of compliance with the plan. Absorbent pads and containment booms shall be stored on-site, if appropriate, to facilitate the clean-up of accidental petroleum releases.
- j. To minimize turbidity in the aquatic environment, any under-layer fills used in the project shall be protected from erosion with suitable material (such as precast concrete armor or mat units) as soon after placement as practicable.
- k. Any soil exposed near water as part of the project shall be protected from erosion (with suitable material such as geotextile, filter fabric, etc.) after exposure and stabilized as soon as practicable (with vegetation matting, hydroseeding etc.).

Revegetation should follow the established standards in Regional Condition #10 (Minimization Measures).

l. Silt fences, silt curtains, or other diversion or containment structures shall be installed to contain sediment and turbidity at the work site (a) parallel to, and within 10 feet of, the toe of any fill or exposed soil which may introduce sediment to an adjacent aquatic site; and (b) adjacent to any fill placed or soil exposed within an aquatic site. All silt fences, curtains, and other structures shall be installed properly and maintained in a functioning manner for the life of the construction period and until the impact area is permanently stabilized, self sustaining, and/or turbidity levels, elevated due to construction, have returned to ambient levels.

m. When the discharge of fill material results in the replacement of wetlands or waters of the US with impervious surfaces, the authorized activity must not result in more than minimal degradation of water quality (in accordance with General Condition 25). To ensure NWP's do not cumulatively degrade water quality from increasing impervious area, projects should incorporate low impact development stormwater practices (e.g. native landscaping, bioretention and infiltration techniques, buffers, green roofs, and green spaces) to the extent practical to retain stormflows and pollutants on-site. More information including low impact stormwater concepts and definitions is available at:

<http://www.epa.gov/owow/NPS/lid/>.

8. State of Hawaii, Department of Health, Clean Water Branch (DOH) Requirements (Projects in the State of Hawaii Only)

a. You must obtain a Clean Water Act (CWA) Section 401 Water Quality Certification (WQC) from the DOH before the Honolulu District can issue verification for proposed work requiring authorization under CWA Section 404. All conditions of a Section 401 WQC issued for a project are hereby incorporated into the project's NWP verification and are subject to discretionary enforcement by the Honolulu District. The permittee is strongly encouraged to submit a DOH WQC application to DOH, with site-specific BMPs, applicable monitoring plan, and any dredge spoils management plans, to complete the PCN and to expedite the review process.

b. You must contact the DOH to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. For work authorizations requiring verification solely under Section 10 of the Rivers and Harbors Act of 1899, any best management practices (BMPs) required or recommended by the DOH for purposes of avoiding and minimizing the discharge of pollutants, other than dredged or fill material, into state waters, including 303(d)-listed impaired waters, are hereby incorporated into the NWP verification. These conditions are subject to discretionary enforcement by the Honolulu District.

c. For projects directly impacting “Impaired Waters” as listed on the most recent CWA Section 303(d) list (<http://hawaii.gov/health/environmental/env-planning/wqm/wqm.html>), the PCN shall:

- (1) Identify the waterbody as an Impaired Water; and
- (2) Submit any mitigating measures or BMPs required/recommended to isolate and confine work in these areas.

d. You may dispose of dredged spoils at state permitted landfills, provided you comply with the landfill’s acceptance criteria. No preapproval by the DOH-Solid and Hazardous Waste Branch is required for this action. The generator shall provide documentation to DOH upon request.

You may use dredge spoils at off-site locations, provided the dredged spoils meet the Hawaii DOH Soil Environmental Action Levels for unrestricted use. You must adequately characterize the dredged spoils, including conducting sampling and analysis in accordance with the HEER Office Technical Guidance Manual and other relevant guidance documents. Sampling methodology and analytical results shall be documented, including a comparison to EALs, and maintained by the generator. The spoils shall also meet the definition of inert fill material, which generally includes “...earth, soil, rocks, and rock-like materials... The fill material shall not contain vegetation or other organic material, or other solid waste.” The generator shall provide the documentation to the DOH upon request. Offsite placement of dredged spoils that do not meet the above criteria or without adequate records may be considered illegal dumping and subject to enforcement action.

10.3 Regional Condition 3 – Acreage Limitation

For any discharge of dredged or fill material in a special aquatic site, including wetlands, authorized by NWP 3, 7, 40, 41, 43, 45, 46, or 51, or a combination of any of these NWPs, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/10-acre.

10.4 Regional Condition 4 – Length Limitation

Any discharge of dredged or fill material in any stream bed, including intermittent and ephemeral streams, authorized by NWP 12, 13, 14, 40, 45, 46, or 51 may not exceed 200 linear feet.

10.5 Regional Condition 5 – Sidecasting

Except for activities authorized under NWP 12, no activity may sidecast material into waters of the United States. For any activity authorized under NWP 12, no material may be sidecast into flowing waters or waters subject to tidal action. Any material removed from an area suspected to contain contamination may not be sidecast for re-use, but must be disposed of in an upland

location. All sidecast material must be completely removed at the earliest practicable date but no later than 30 days after its placement in waters of the U.S.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

11.1 Water Quality Certification

At the time these document were prepared, the final state certification for the Hawaii Section 401 WQC had not been issued, although on February 8, 2012, a representative of the Department of Health (the office that issues Section 401 Water Quality Certifications) indicated by personal communication that it was the Department's intent to issue a blanket certification for approximately 7 NWP's, those used most frequently in the State of Hawaii. That process would not begin until publication of the Federal Register notice announcing the Final NWP's. While no blanket WQC was issued for Hawaii for the 2007 NWP's, POH anticipates that the conditions associated with this blanket certification would be similar to those imposed for the 2002 NWP's, which we found to be reasonable and not result in a denial of any one or number of NWP's for the State of Hawaii. Outside of specific coordination with the DOH in regard to the NWP renewal, the DOH has not imposed any special conditions to individual verifications during the 2007-2012 period in such a manner to indicate that those special conditions would become additional conditions of the blanket certification.

The Corps will generally defer to states regarding conditions for WQC's. Any conditions of the WQC provided by the state become conditions of issued NWP authorizations. However, if the Corps believes conditions do not meet our permit conditioning policy at 33 CFR 325.4, the Corps may use its enforcement discretion on those conditions. Moreover, if a WQC condition would impose an unacceptable level of additional work by the Corps, we will view the conditions as a denial without prejudice.

By letter dated August 12, 2011, Guam Environmental Protection Agency (GEPA) provided its final WQC determinations for the 2012 NWP's in Guam. GEPA did not issue a WQC for this NWP. Accordingly, for activities otherwise meeting the terms and conditions of this NWP, this NWP's authorization for all such activities within Guam are denied without prejudice until GEPA issues an individual WQC or waives its right to do so.

American Samoa and CNMI were undecided as to final certification of the NWP's at the time of this writing.

11.2 Coastal Zone Management (CZM) Act Consistency Determinations

By letter dated June 29, 2011 the State of Hawaii, Department of Business, Economic Development & Tourism, Office of Planning (the office that administers the Coastal Zone Management Program) issued general CZM consistency concurrences for NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, A (now 51), and B (now 52). The State did not issue any regional conditions as a part of their consistency determination.

The Guam Bureau of Statistics and Plans denied blanket CZM coverage by letter dated December 19, 2011. American Samoa and CNMI were non-committal in their review of the NWP's at this time. Accordingly, the NWP's are denied without prejudice in the Territories of American Samoa and Guam, and in the CNMI. .

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Honolulu District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

13.0 Final Determination

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