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## STAFF REPORT: REGULAR CALENDAR

**Consistency Determination No.:** CD-0004-20

**Federal Agency:** U.S. Army Corps of Engineers

**Location:** Statewide

**Project Description:** Issuance, reissuance, and modifications of Nationwide Permits for discharge of dredged material into waters of the United States.

**Staff Recommendation:** Objection

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## SUMMARY OF STAFF RECOMMENDATION

The Corps of Engineers (Corps) proposes to: (1) reissue the existing 52 Nationwide Permits (NWP), modify 20 of the existing NWP, and issue five new NWP; (2) reissue the existing 32 General Conditions and modify 11 of the existing General Conditions; and (3) reissue the existing 39 Definitions, modify three of the existing Definitions, and delete three Definitions. NWP are general pre-approvals of discharge of fill or dredge material into waters of the United States for specified activities. The Corps created the NWP program to minimize regulatory requirements for discharging fill associated with projects that have minor effects. Unless otherwise specified, the Corps authorizes a NWP permittee to discharge without notice to the Corps; in some cases, however, the permittee must notify the Corps before it discharges fill into waters of the United States.

The Corps usually reissues the NWP every five years. However, the Corps issued its draft NWP on September 15, 2020, two years ahead of the normal schedule. The public comment period on the NWP, general conditions, and definitions runs through November 16, 2020, after the Commission's November 2020 meeting. The Corps states that the actual date for when the reissued NWP go into effect is currently uncertain and will not be

specified until the final NWP's are issued at some future date. Bringing the subject consistency determination before the Commission for its review and action prior to the issuance of the final NWP's, prior to the close of the public comment period, prior to potential modifications to the draft NWP's as a result of public comments, and without knowledge of the date at which the NWP's go into effect is a markedly different procedure than used with previous NWP consistency determinations. In past consistency determinations for NWP reissuance, the Corps requested Commission action when the final NWP's were published and the effective and five-year expiration dates were known. However, notwithstanding the Commission's request to delay action on the subject consistency determination until the final NWP's are issued, the Corps seeks Commission concurrence with the draft NWP's at this time.

The Commission's concurrence with this consistency determination would result in a general federal consistency concurrence covering all authorized NWP activities without providing for any additional review under the Commission's federal consistency jurisdiction. Due to the potential resource impacts of activities authorized under the NWP program, and their lack of consistency with Section 30233(a) of the Coastal Act, for the past 28 years the Commission has consistently objected to the Corps' consistency determinations for NWP reissuance, finding (most recently in 2017, CD-0001-17) that the existing NWP's were inconsistent with the California Coastal Management Program (CCMP). The effect of these objections is that "permittees" for NWP's must either receive a concurrence, or waiver of a consistency certification, from the Commission or its staff before their NWP's become valid.

For similar reasons, the proposed draft NWP's in the subject consistency determination are inconsistent with Section 30233(a) of the Coastal Act. In most cases, the construction activities authorized by these NWP's are not allowable uses pursuant to Section 30233(a). Additionally, the approval in advance of any development proposal does not allow the Commission to determine if the development is the least damaging feasible alternative. Finally, most of the proposed NWP's do not include a requirement for mitigation of any adverse wetland impacts. For those that require mitigation, without further review opportunities the Commission would not have the ability to determine the adequacy of the mitigation.

An objection to the Corps' proposed NWP program will not eliminate Nationwide Permits in the California coastal zone. Instead, it will maintain the historic procedure used by the Commission and the Corps of Engineers which requires federal consistency review of a proposed activity before a NWP can apply to that activity. Depending on the circumstances, the Commission can either waive or require a consistency certification. Pursuant to the CCMP, a coastal development permit issued by the Commission functions as a consistency certification. In addition, Coastal Act Section 30719 states that activities consistent with a port master plan are consistent with the CCMP for Coastal Zone Management Act purposes. If an activity is within a certified LCP's appeal zone, on a case-by-case review, the staff can waive the requirement for a consistency certification if the activity does not raise any statewide or regional issues. Finally, if an activity is within a certified LCP jurisdiction or outside the coastal zone, the staff has the discretion to waive a consistency certification if the activity does not have significant adverse effects on coastal resources.

The staff therefore recommends that the Commission **object** to the Corps' consistency determination CD-0004-20. The motion and resolution are on Page 5 of this report. The standard of review for this consistency determination is the Chapter 3 policies of the Coastal Act.

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### EXHIBITS

- [Exhibit 1](#) – Corps of Engineers Los Angeles District Draft Regional Conditions
- [Exhibit 2](#) – Corps of Engineers San Francisco District Draft Regional Conditions
- [Exhibit 3](#) – Sample Corps of Engineers Letter to NWP Applicant Regarding Federal Consistency Requirement
- [Exhibit 4](#) – Sample Coastal Commission Federal Consistency Jurisdiction Letter to NWP Applicant

## I. FEDERAL AGENCY'S CONSISTENCY DETERMINATION

The U.S. Army Corps of Engineers has determined the project is consistent to the maximum extent practicable with the California Coastal Management Program.

## II. MOTION AND RESOLUTION

### MOTION:

*I move that the Commission **concur** with consistency determination CD-0004-20 that the project described therein is consistent to the maximum extent practicable, with the enforceable policies of the California Coastal Management Program (CCMP).*

Staff recommends a **NO** vote on the motion. Failure of this motion will result in an objection to the determination and adoption of the following resolution and findings. An affirmative vote of a majority of the Commissioners present is required to pass the motion.

### RESOLUTION:

The Commission hereby **objects** with consistency determination CD-0004-20 by the U.S. Army Corps of Engineers for the proposed permit program on the grounds that the permit program described therein is not consistent, and not consistent to the maximum extent practicable, with the enforceable policies of the California Coastal Management Program.

## III. APPLICABLE LEGAL AUTHORITIES

Section 307 of the Coastal Zone Management Act (CZMA) provides in part:

*(c)(1)(A) Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.*

### **Procedure if the Commission finds that the proposed activity is inconsistent with the CCMP.**

Section 930.43(a) of the federal consistency regulations (15 CFR § 930.43(a)) requires that, if the Commission's objection is based on a finding that the proposed activity is inconsistent with the CCMP, the Commission must identify measures, if they exist, that would bring the project into conformance with the CCMP. That section states that:

(a) In the event the State agency objects to the Federal agency's consistency determination, the State agency shall accompany its response to the Federal agency with its reasons for the objection and supporting information. The State agency

response shall describe: (1) How the proposed activity will be inconsistent *with specific enforceable policies of the management program*; and (2) *The specific enforceable policies (including citations).*

*(3) The State agency should also describe alternative measures (if they exist) which, if adopted by the Federal agency, would allow the activity to proceed in a manner consistent to the maximum extent practicable with the enforceable policies of the management program. Failure to describe alternatives does not affect the validity of the State agency's objection.*

As described in the Wetland section below, the proposed activity is not consistent with the CCMP. Pursuant to the requirements of Section 930.43 of the federal regulations implementing the CZMA, the Commission is responsible for identifying measures, if they exist, that would allow the activity to be found consistent with the CCMP. Since most of the NWP's do not meet the allowable use test described in Section 30233(a) of the Coastal Act and none of the NWP's can be evaluated for consistency with the alternative and mitigation tests at a general level, *there are no alternative measures that could bring this permit into compliance with the CCMP.* However, as a practical matter, the Commission's approach to reviewing projects on a case-by-case approach represents an alternative that allows individual projects to proceed (see page 14 of this report for elaboration). This approach is in fact contemplated in the federal consistency regulations (Section 930.31(d)), which provide:

*§ 930.31 Federal agency activity.*

*(d) A general permit proposed by a Federal agency is subject to this subpart if the general permit does not involve case-by-case or individual issuance of a license or permit by a Federal agency. When proposing a general permit, a Federal agency shall provide a consistency determination to the relevant management programs and request that the State agency(ies) provide the Federal agency with review, and if necessary, conditions, based on specific enforceable policies, that would permit the State agency to concur with the Federal agency's consistency determination. State agency concurrence shall remove the need for the State agency to review individual uses of the general permit for consistency with the enforceable policies of management programs. Federal agencies shall, pursuant to the consistent to the maximum extent practicable standard in § 930.32, incorporate State conditions into the general permit. If the State agency's conditions are not incorporated into the general permit or a State agency objects to the general permit, then the Federal agency shall notify potential users of the general permit that the general permit is not available for use in that State unless an applicant under subpart D of this part or a person under subpart E of this part, who wants to use the general permit in that State provides the State agency with a consistency certification under subpart D of this part and the State agency concurs. When subpart D or E of this part applies, all provisions of the relevant subpart apply.*

### **Consistent to the Maximum Extent Practicable.**

Section 930.32 of the federal consistency regulations provides, in part, that:  
*(a)(1) The term “consistent to the maximum extent practicable” means fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency.*

The Commission recognizes that the standard for approval of federal projects is that the activity must be “consistent to the maximum extent practicable” (CZMA Section 307(c)(1)). This standard allows a federal activity that is not fully consistent with the CCMP to proceed, if compliance with the CCMP is “prohibited [by] existing Federal law applicable to the Federal agency's operations.”<sup>1</sup> The U.S. Army Corps of Engineers did not provide any documentation to support a maximum extent practicable argument in its consistency determination or in any subsequent documents. Therefore, there is no basis to conclude that existing law applicable to the Federal agency prohibits full consistency.

## **IV. FINDINGS AND DECLARATIONS**

### **A. PROJECT DESCRIPTION**

The Corps of Engineers proposes to: (1) reissue the existing 52 Nationwide Permits (NWP), modify 20 of the existing NWP, and issue five new NWP; (2) reissue the existing 32 General Conditions and modify 11 of the existing General Conditions; and (3) reissue the existing 39 Definitions, modify four of the existing Definitions, and drop two existing Definitions. NWP are general pre-approvals of discharge of fill or dredge material into waters of the United States for specified activities. The Corps created the NWP program to minimize regulatory requirements for discharging fill associated with projects that have minor effects. Unless otherwise specified, the Corps authorizes a permittee to discharge without notice to the Corps.

The Corps usually reissues the NWP every five years. However, the Corps issued its draft NWP on September 15, 2020, two years ahead of the normal schedule. The public comment period on the NWP, general conditions, and definitions runs through November 16, 2020, after the Commission's November 2020 meeting. The Corps states that the actual date for when the reissued NWP go into effect is currently uncertain and will not be specified until the final NWP are issued at some future date. Bringing the subject consistency determination before the Commission for its review and action prior to the issuance of the final NWP, prior to the close of the public comment period, prior to potential modifications to the draft NWP as a result of public comments, and without knowledge of the date at which the NWP go into effect is a markedly different procedure than used with previous NWP consistency determinations. In past consistency determinations for NWP reissuance, the Corps requested Commission action when the final NWP were published and the effective and five-year expiration dates were known. However, notwithstanding the Commission's request to delay action on the subject consistency determination until the final NWP are issued, the Corps seeks Commission concurrence with the draft NWP at this time.

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<sup>1</sup> 15 CFR Section 930.32.

The following list identifies the proposed 52 reissued NWP's (two are "reserved" and are not actual permits), with the 20 modified NWP's highlighted in *italic* type and the five new NWP's highlighted in **bold** type:

1. Aids to Navigation.
2. Structures in Artificial Canals.
3. *Maintenance.*
4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.
5. Scientific Measurement Devices.
6. Survey Activities.
7. Outfall Structures and Associated Intake Structures.
8. Oil and Gas Structures on the Outer Continental Shelf.
9. Structures in Fleeting and Anchorage Areas.
10. Mooring Buoys.
11. Temporary Recreational Structures.
12. *Oil or Natural Gas Pipeline Activities*
13. *Bank Stabilization.*
14. *Linear Transportation Projects.*
15. U.S. Coast Guard Approved Bridges.
16. Return Water From Upland Contained Disposal Areas.
17. *Hydropower Projects.*
18. Minor Discharges.
19. *Minor Dredging.*
20. Response Operations for Oil and Hazardous Substances.
21. *Surface Coal Mining Activities.*
22. Removal of Vessels.
23. Approved Categorical Exclusions.
24. Indian Tribe or State Administered Section 404 Programs.
25. Structural Discharges.
26. [Reserved].
27. *Aquatic Habitat Restoration, Establishment, and Enhancement Activities.*
28. Modifications of Existing Marinas.
29. *Residential Developments.*
30. Moist Soil Management for Wildlife.
31. Maintenance of Existing Flood Control Facilities.
32. Completed Enforcement Actions.
33. Temporary Construction, Access, and Dewatering.
34. Cranberry Production Activities.
35. Maintenance Dredging of Existing Basins.
36. Boat Ramps.
37. Emergency Watershed Protection and Rehabilitation.
38. Cleanup of Hazardous and Toxic Waste.
39. *Commercial and Institutional Developments.*
40. *Agricultural Activities.*
41. *Reshaping Existing Drainage Ditches.*
42. *Recreational Facilities.*
43. *Stormwater Management Facilities.*



44. *Mining Activities.*
45. Repair of Uplands Damaged by Discrete Events.
46. Discharges in Ditches.
47. [Reserved]
48. *Commercial Shellfish Mariculture Activities.*
49. *Coal Remining Activities.*
50. *Underground Coal Mining Activities.*
51. *Land-Based Renewable Energy Generation Facilities.*
52. *Water-Based Renewable Energy Generation Pilot Projects.*
53. Removal of Low-Head Dams.
54. Living Shorelines.
- A. Seaweed Mariculture Activities**
- B. Finfish Mariculture Activities**
- C. Electric Utility Line and Telecommunications Activities**
- D. Utility Line Activities for Water and Other Substances**
- E. Water Reclamation and Reuse Facilities**

The following list identifies all of the General Conditions associated with the NWP program, with the 11 modified General Conditions highlighted in *italic* type:

1. Navigation.
2. Aquatic Life Movements.
3. Spawning Areas.
4. Migratory Bird Breeding Areas.
5. Shellfish Beds.
6. Suitable Material.
7. Water Supply Intakes.
8. Adverse Effects from Impoundments.
9. Management of Water Flows.
10. Fills Within 100-Year Floodplains.
11. Equipment.
12. Soil Erosion and Sediment Controls.
13. *Removal of Temporary Fills.*
14. Proper Maintenance.
15. Single and Complete Project.
16. Wild and Scenic Rivers.
17. *Tribal Rights.*
18. *Endangered Species.*
19. *Migratory Bird and Bald and Golden Eagle Permits.*
20. *Historic Properties.*
21. Discovery of Previously Unknown Remains and Artifacts.
22. Designated Critical Resource Waters.
23. *Mitigation.*
24. Safety of Impoundment Structures.
25. *Water Quality.*
26. *Coastal Zone Management.*
27. Regional and Case-by-Case Conditions.
28. *Use of Multiple Nationwide Permits.*

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- 29. Transfer of Nationwide Permit Verifications.
- 30. Compliance Certification.
- 31. *Activities Affecting Structures or Works Built by the United States.*
- 32. *Pre-Construction Notification.*

The following list identifies all of the Definitions associated with the NWP program, with the three modified Definitions highlighted in *italic* type and the three Definitions dropped highlighted in ~~**bold**~~ type:

Best Management Practices (BMPs).  
Compensatory mitigation.  
Currently serviceable.  
Direct Effects.  
Discharge.  
Ecological Reference  
Enhancement.  
~~**Ephemeral stream.**~~  
Establishment (creation).  
High Tide Line.  
Historic property.  
Independent utility.  
Indirect Effects.  
~~**Intermittent stream.**~~  
*Loss of waters of the United States.*  
Navigable Waters.  
Non-tidal wetland.  
Open water.  
*Ordinary high water mark.*  
*Perennial stream.*  
Practicable.  
Pre-construction notification.  
Preservation.  
~~**Protected Tribal Resources.**~~  
Re-establishment.  
Rehabilitation.  
Restoration.  
Riffle and pool complex.  
Riparian areas.  
Shellfish seeding.  
Single and complete linear project.  
Single and complete non-linear project.  
Stormwater management.  
Stormwater management facilities.  
Stream bed.  
Stream channelization.  
Structure.  
Tidal wetland.

Tribal Lands  
 Tribal Rights  
 Vegetated shallows.  
 Waterbody.

Pages 57298 through 57395 of the September 15, 2020, Federal Register contain a detailed description of the aforementioned draft NWP (see pages 57368-57385), draft General Conditions (see pages 57385-57392), and draft Definitions (see pages 57393-57395) included in the Corps' consistency determination. The Commission incorporates those detailed descriptions into these findings by reference (<https://www.govinfo.gov/content/pkg/FR-2020-09-15/pdf/2020-17116.pdf>). The balance of the September 15, 2020, Federal Register notice contains a discussion of the NWP program and the procedures used by the Corps to reissue the NWPs. In addition, the Los Angeles and San Francisco Districts of the Corps of Engineers have developed draft Regional Conditions ([Exhibits 1 and 2](#)) and the final version of these conditions will apply to the final reissued NWPs in these two Corps districts.

## **B. Wetland Habitat.**

Section 30233 of the Coastal Act provides, in part, that:

- (a) *The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:*
- (1) *New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.*
  - (2) *Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.*
  - (3) *In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.*
  - (4) *Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.*
  - (5) *Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.*
  - (6) *Restoration purposes.*
  - (7) *Nature study, aquaculture, or similar resource-dependent activities.*

...

*(c) In addition to the other provisions of this section, diking, filling, or dredging in existing estuaries and wetlands shall maintain or enhance the functional capacity of the wetland or estuary. Any alteration of coastal wetlands identified by the Department of Fish and Game, including, but not limited to, the 19 coastal wetlands identified in its report entitled, "Acquisition Priorities for the Coastal Wetlands of California", shall be limited to very minor incidental public facilities, restorative measures, nature study, commercial fishing facilities in Bodega Bay, and development in already developed parts of south San Diego Bay, if otherwise in accordance with this division.*

The Commission previously evaluated the Corps' NWP program on eight occasions. In its first two reviews, in 1983 and 1984 (CC-13-83 and CC-15-84), the Commission concurred with most of the NWPs.

In its third review, in 1991, the Commission objected to the entire NWP program (CC-39-91). That objection was necessary because the Corps' consistency certification lacked the necessary information for the Commission to concur with the consistency certification and because several of the NWPs were inconsistent with the CCMP, specifically Section 30233. The Corps did not provide a final and complete description of the program, definitions for vague terms such as "minimal," "small," or "temporary," or analysis of cumulative impacts to the coastal zone. Without this information, the Commission could not assess the project's impact to coastal resources and uses, and, therefore objected to the Corps' consistency certification. In addition, the NWP program raised issues regarding fisheries, water quality, and oil and gas development. The activities authorized by these NWPs could result in significant individual and cumulative impacts to coastal resources. The NWP program did not contain any assurances that the "permittees" would conduct authorized activities in a manner consistent with the CCMP. Therefore, the Commission found the NWP program to be inconsistent with the CCMP.

In its fourth through eighth reviews of the NWP program, in 1996, 2002, 2007, 2012, and 2017 the Commission again objected to the entire program (CC-147-96, CD-003-02, CD-013-07, CD-004-12, and CD-0001-17, respectively). The Commission found in these reviews that the proposed NWPs were inconsistent with Section 30233 of the Coastal Act, and in particular, the allowable use, least damaging feasible alternative, and mitigation policies of Section 30233(a).

The NWP program expires every five years. However, for the subject consistency determination the Corps issued its draft NWPs on September 15, 2020, two years ahead of the normal schedule. The current proposal is to: (1) reissue the existing 52 Nationwide Permits (NWPs), modify 20 of the existing NWPs, and issue five new NWPs; (2) reissue the existing 32 General Conditions and modify 11 of the existing General Conditions; and (3) reissue the existing 39 Definitions, modify three of the existing Definitions, and drop three existing Definitions. The consistency determination submitted by the Corps is simply the September 15, 2020, Federal Register notice. The submittal does not contain any analysis of the NWP program's consistency with the CCMP, nor does it address the coastal resource issues previously raised by the Commission, most recently in CD-0001-

17. The issues raised by the Commission in its previous analysis are still valid and the Commission incorporates into this report the findings supporting its objection to the 2017 NWP's (CD-0001-17) by reference.

The proposed NWP program allows the placement of fill into waters of the United States for any purpose described in an issued NWP. Since this program authorizes the placement of fill within wetlands, the Commission must determine if the permit is consistent with Section 30233(a) of the Coastal Act. That section restricts the placement of fill into wetlands to seven enumerated uses. The following NWP's are for categories of activities that either do not qualify as allowable uses under Section 30233 at all or are broader than the allowable use categories defined in Section 30233: NWP 2 (Structures in Artificial Canals), NWP 3 (Maintenance), NWP 6 (Survey Activities), NWP 14 (Linear Transportation Projects), NWP 15 (U.S. Coast Guard Approved Bridges), NWP 19 (Minor Dredging), NWP 21 (Surface Coal Mining Activities), NWP 25 (Structural Discharges), NWP 29 (Residential Developments), NWP 31 (Maintenance of Existing Flood Control Facilities), NWP 33 (Temporary Construction, Access, and Dewatering), NWP 39 (Commercial and Institutional Developments), NWP 40 (Agricultural Activities), NWP 41 (Reshaping Existing Drainage Ditches), NWP 42 (Recreational Facilities), NWP 43 (Stormwater Management Facilities), NWP 44 (Mining Activities), NWP 45 (Repair of Uplands Damaged by Discrete Events), NWP 49 (Coal Remining Activities), NWP 50 (Underground Coal Mining Activities), NWP C (Electric Utility Line and Telecommunications Activities), NWP D (Utility Line Activities for Water and Other Substances), and NWP E (Water Reclamation and Reuse Facilities).

In most cases, the Commission would find such activities inconsistent with the Coastal Act. However, through an individual review, the Commission may find that under special circumstances some of the activities authorized by these NWP's are consistent with the allowable-use requirement of the Coastal Act. Nevertheless, the Commission can only make that determination on an individual basis. Thus, a general approval for fill associated with these activities in advance of a project proposal is inconsistent with the allowable-use requirement of Section 30233(a) of the Coastal Act. Therefore, the Commission finds that the NWP's are inconsistent with the allowable-use requirement of Section 30233.

Another requirement of Section 30233(a) allows the Commission to approve an activity if it is the least damaging feasible alternative and to determine if it includes feasible mitigation to reduce any environmental impacts. The proposed NWP program does not provide for analysis of alternatives or mitigation. The NWP's authorizes the "permittee" to place fill in the aquatic environment even if there is a less damaging alternative. Additionally, most of the NWP's do not require mitigation, and may result in a net loss of wetlands. With respect to the NWP's that allow for mitigation, there is no process for public, governmental, and scientific review of that mitigation to ensure that the project minimizes environmental effects. Additionally, the program would not allow for the Commission to determine if the mitigation is adequate to address the project's impacts or its consistency with the Coastal Act. Therefore, the Commission finds that the proposed NWP program is inconsistent with the alternatives and mitigation requirements of Section 30233(a).

In conclusion, the proposed NWP program is inconsistent with Section 30233(a) of the Coastal Act for the following reasons: (1) it would authorize activities that are not normally allowable under Section 30233(a); (2) it does not require the permittee to construct the

least environmentally damaging alternative; and (3) it does not require mitigation for adverse impacts to wetland habitat. Additionally, the NWP program does not provide enough information to fully evaluate the program's consistency with the CCMP. Therefore, the Commission finds that the proposed NWP program is inconsistent with the wetland fill policy of the CCMP.

### **C. Procedures.**

As stated above, the Commission most recently objected to the 2017 NWP program. This objection initiated a process provided for in the NWP regulations (33 CFR 330.4(d)). Specifically, these regulations require "applicants" to coordinate with the state coastal management agency pursuant to the requirements of the Coastal Zone Management Act before the activity can make use of an NWP. However, for those activities inside or affecting the coastal zone, the NWPs are not valid until the Commission either concurs with a consistency certification or waives federal consistency. After the "permittee" completes the federal consistency process, the NWPs are valid for that activity. Since its last objection to the NWP program, the Commission has either waived federal consistency for most of the activities subject to NWPs, reviewed the projects as coastal development permits and/or appeals of coastal development permits, or determined that projects are consistent with port master plans under Coastal Act Section 30719.

The staffs of the Corps and the Commission have informally agreed upon procedures that allow most activities qualifying for a NWP to continue without any significant delays. Upon receipt of notice of a pre-discharge notice or other notice of a NWP activity within a coastal area, the Corps sends the applicant a letter informing the applicant that the NWP is not valid until the applicant receives either a federal consistency concurrence or waiver from the Commission ([Exhibit 3](#)). Upon receipt of a copy of this letter (usually within two weeks), the Commission staff sends a "Jurisdiction Letter" ([Exhibit 4](#)) to both the Corps and the applicant identifying the Commission federal consistency or permit jurisdiction or, if appropriate, waiving federal consistency. If additional Commission review is necessary, the Commission will complete the review process within the appropriate statutory or regulatory requirements.

For those activities qualifying for a NWP within a coastal area but which do not require the applicant to submit to the Corps a pre-discharge or other notice of a NWP activity, the Corps states on its regulatory websites for the Los Angeles and San Francisco Districts that a NWP applicant should contact the appropriate Corps district office to determine the status of Coastal Zone Management Act consistency for a NWP. However, given that the Commission has previously determined that the NWP program is not consistent with the California Coastal Management Program, and given the same determination made in these findings for the subject CD-0004-20, all Corps NWP applicants should contact the Coastal Commission to obtain guidance on complying with federal consistency requirements for the proposed activity.

Therefore, the Commission's objection to the subject consistency determination will have the same effect as previous objections to consistency determinations for the NWP program. A NWP will not be valid for any qualifying activity until the Commission either concurs with a consistency certification or waives the requirement.

## **APPENDIX A: SUBSTANTIAL FILE DOCUMENTS**

1. Notice of Reissuance of Nationwide Permits, Federal Register, Vol. 85, No. 179, pp. 57298-57395, September 15, 2020.
2. Consistency Determination No. CD-0001-17 (Corps of Engineers, Issuance, Reissuance, and Modifications of 52 Nationwide Permits).
3. Consistency Determination No. CD-004-12 (Corps of Engineers, Issuance, Reissuance, and Modifications of 52 Nationwide Permits).
4. Consistency Determination No. CD-013-07 (Corps of Engineers, Issuance, Reissuance, and Modifications of 49 Nationwide Permits).
5. Consistency Determination No. CD-003-02 (Corps of Engineers, Issuance, Reissuance, and Modifications of 44 Nationwide Permits).
6. Consistency Certification No. CC-147-96 (Corps of Engineers, Issuance, Reissuance, and Modifications of 39 Nationwide Permits).
7. Consistency Certification No. CC-39-91 (Corps of Engineers, Authorization of 36 Nationwide Permits).
8. Consistency Certification No. CC-15-84 (Corps of Engineers, Amendment to previously approved Nationwide Permit Program).
9. Consistency Certification No. CC-13-83 (Corps of Engineers, Authorization of Nationwide Permits).
10. Consistency Certification No. CC-40-95 (Corps of Engineers, Issuance of a Nationwide Permit for Residential Structures).