Regulatory Division

Subject: File Number 2004-28601N

Mr. David Nicholson
Marin County Flood Control & Water Conservation District
3501 Civic Center Drive, Room 304
San Rafael, California 94903

Dear Mr. Nicholson:

This document supersedes authorization issued on July 1, 2016. This correspondence is in reference to your submittal of March 14, 2016, on behalf of Marin County Flood Control & Water Conservation District, concerning Department of the Army (DA) authorization to remove up to approximately 35,000 cubic yards of material for flood capacity from 5,630 lineal feet of Novato Creek between Diablo Avenue at the Novato Fair Bridge in downtown Novato and the railroad trestle east of Highway 101; 1,780 lineal feet of Warner Creek; and 680 lineal feet of Arroyo Avichi Creek in the City of Novato, Marin County, California. The project will require the construction of earthen cofferdams for dewatering the site. They will be installed at the upper project reach on Novato Creek and Warner Creek, and downstream and upstream of Diablo Avenue, respectively, and approximately 500 feet downstream of the Sonoma Marin Area Rail Transit (SMART) railroad bridge. The upper reach will be dewatered using a system of pipelines pumping over the levee into Lynwood Basin. Where possible, the material will be removed from the top of the levees using an excavator. In portions of the creek where that is not possible, draglines, bulldozers, and excavators will be utilized to gather the material where it will be moved to designated removal points. Final grading will be completed using bulldozers and graders. The removed sediment will be transported by truck and stored at one of five locations. The majority of removed sediment will be placed on top of the new structural core levees within the North Deer Island Basin, a diked fresh water retention area, to dry and then be tested for suitability analysis. Sediment that does not meet structural core standards would be placed on levee tops to maintain vehicular access for maintenance. In addition, sediment will be used to construct shallow sloped sides for an ecotone levee to generate high tide refugia and transitional habitats as the sea levels rise. Remaining sediment will be placed in stockpile locations used in prior years such as the G noss Field airport and the nearby Lynwood Levee. A Feasibility Study will be conducted to investigate future thin-lift placement of dredged sediment to raise marsh elevations during later sediment removal episodes (i.e. 2020). Raising marsh elevations will avoid excessive flooding, loss of habitat and convert some marsh areas to mudflats when levees are breached to allow the return of tidal influence.

Work within U.S. Army Corps of Engineers’ (Corps) jurisdiction will include removal of 24,000-35,000 cubic yards of sediment from a combined total of 8,090 linear feet of Novato,
Warner and Arroya Avichi Creeks. Work will require placement of existing native fill within Novato Creek downstream of Diablo Avenue and on Warner Creek upstream of Diablo Avenue to construct coffer dams to generate a dry work area. Approximately 600 cubic yards of native fill will be placed in approximately 90 linear feet of creek to construct the coffer dams. If needed, sediment would be stored on top of upland levees at Deer Island Basin as well as Lynwood Levee and Gnoss Field Airport levees as they become available from removal of currently stored materials used to construct North Deer Island Basin levee core. All work shall be completed in accordance with the plans and drawings titled “County of Marin Department of Public Works Novato Creek Maintenance Sediment Removal Project” prepared by County of Marin Department of Public Works dated February 2016, consisting of 3 sheets and “Novato Creek Sediment Removal 2016 New Levee Plan” prepared by County of Marin dated January 8, 2016, consisting of 3 sheets (plans combined and attached as Enclosure 1).

Section 404 of the Clean Water Act (CWA) generally regulates the discharge of dredged or fill material below the plane of ordinary high water in non-tidal waters of the United States, below the high tide line in tidal waters of the United States, and within the lateral extent of wetlands adjacent to these waters. Section 10 of the Rivers and Harbors Act generally regulates construction of structures and work, including excavation, dredging, and discharges of dredged or fill material, occurring below the plane of mean high water in tidal waters of the United States; in former diked baylands currently below mean high water; outside the limits of mean high water but affecting the navigable capacity of tidal waters; or below the plane of ordinary high water in non-tidal waters designated as navigable waters of the United States. Navigable waters of the United States generally include all waters subject to the ebb and flow of the tide; and/or all waters presently used, or have been used in the past, or may be susceptible for future use to transport interstate or foreign commerce. A Preliminary Jurisdictional Determination (JD) has been completed for your site. Preliminary JDs are written indications that there may be waters of the U.S. on a parcel or indications of the approximate location(s) of waters of the U.S. on a parcel. Preliminary JDs are advisory in nature and may not be appealed. While this preliminary jurisdictional determination was conducted pursuant to Regulatory Guidance Letter No. 08-02, Jurisdictional Determinations, it may be subject to future revision if new information or a change in field conditions becomes subsequently apparent. The basis for this preliminary jurisdictional determination is fully explained in the enclosed Preliminary Jurisdictional Determination Form. You are requested to sign and date this form and return it to this office within two weeks of receipt.

Based on a review of the information in your submittal the project qualifies for authorization under Department of the Army Nationwide Permit(s) (NWPs) 31 Maintenance of Existing Flood Control Facilities (77 Fed. Reg. 10, February 21, 2012) pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. Section 403) and Section 404 of the Clean Water Act (33 U.S.C. Section 1344) (enclosures 2a and 2b). The project must be in compliance with the terms of the NWP, the general conditions of the Nationwide Permit Program.
You must also be in compliance with any special conditions specified in this letter for the NWP authorization to remain valid. Non-compliance with any term or condition could result in the revocation of the NWP authorization for your project, thereby requiring you to obtain an Individual Permit from the Corps. This NWP authorization does not obviate the need to obtain other State or local approvals required by law.

Before you undertake any future activities requiring DA authorization, you must contact the Corps to ensure that you are in conformance with applicable laws and regulations.

This verification will remain valid until March 18, 2017, unless the NWP authorization is modified, suspended, or revoked. Activities which have commenced (i.e., are under construction) or are under contract to commence in reliance upon a NWP will remain authorized provided the activity is completed within 12 months of the date of a NWP’s expiration, modification, or revocation, unless discretionary authority has been exercised on a case-by-case basis to modify, suspend, or revoke the authorization in accordance with 33 C.F.R. § 330.4(e) and 33 C.F.R. § 330.5 (c) or (d). This verification will remain valid if, during the time period between now and March 18, 2017, the activity complies with any subsequent modification of the NWP authorization. The Chief of Engineers will periodically review NWPs and their conditions and will decide to modify, reissue, or revoke the permits. If a NWP is not modified or reissued within five years of its effective date, it automatically expires and becomes null and void. It is incumbent upon you to remain informed of any changes to the NWPs. Changes to the NWPs would be announced by Public Notice posted on our website (http://www.spn.usace.army.mil/Missions/RegulatoryPublicNotices.aspx). Upon completion of the project and all associated mitigation requirements, you shall sign and return the Certification of Compliance, enclosure 3, verifying that you have complied with the terms and conditions of the permit.

This authorization will not be effective until you have obtained a Section 401 water quality certification from the San Francisco Bay Regional Water Quality Control Board (RWQCB). If the RWQCB fails to act on a valid request for certification within two months after receipt of a complete application, the Corps will presume a waiver of water quality certification has been obtained. You shall submit a copy of the certification to the Corps prior to the commencement of work.

General Condition 18 stipulates that project authorization under a NWP does not allow for the incidental take of any federally-listed species in the absence of a biological opinion (BO) with incidental take provisions. As the principal federal lead agency for this project, the Corps initiated consultation with the National Marine Fisheries Service (NMFS) to address project
related impacts to listed species, pursuant to Section 7(a) of the Endangered Species Act of 1973, as amended (16 U.S.C. § 1531 et seq.). By letter of June 27, 2016, NMFS issued a BO (WCR-2016-4215), attached as enclosure 3, with an incidental take statement for federally listed threatened Central California Coast steelhead (Oncorhynchus mykiss). As the principal federal lead agency for this project, the Corps initiated consultation with the National Marine Fisheries Service (NMFS) to address project related impacts to Essential Fish Habitat (EFH) for various life stages of fish species managed with the Pacific Groundfish Fishery Management Plan, Coastal Pelagics Fishery Management Plan, and Pacific Coast Salmon Fishery Management Plan, pursuant to Magnuson-Stevens Fishery Conservation and Management Act of 1996, as amended (16 U.S.C. § 1801 et seq.). NMFS determined that the project warranted no EFH conservation measures.

In order to ensure compliance with this NWP authorization, the following special conditions shall be implemented:

1. This Corps permit does not authorize you to take an endangered species. In order to legally take a listed species, you must have a separate authorization under the Endangered Species Act (ESA) (e.g., an ESA Section 10 permit or a Biological Opinion (BO) under ESA Section 7 with "incidental take" provisions with which you must comply). The enclosed National Marine Fisheries Service (NMFS) BO dated June 27, 2016, contains mandatory terms and conditions to implement the reasonable and prudent measures that are associated with "incidental take" that is also specified in the BO. Your authorization under this Corps permit is conditional upon your compliance with all of the mandatory terms and conditions associated with incidental take authorized by the attached BO, whose terms and conditions are incorporated by reference in this permit. Failure to comply with the terms and conditions associated with incidental take of the BO, where a take of the listed species occurs, would constitute an unauthorized take and it would also constitute non-compliance with this Corps permit. The NMFS is the appropriate authority to determine compliance with the terms and conditions of its BO and with the ESA.

2. All in water work shall be performed between June 15 and October 31.

3. Cofferdams must be removed immediately following project completion and by October 31.

4. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify
this office of what you have found. The Corps will initiate the Federal and State coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

5. All staging, maintenance, and storage of heavy machinery shall be conducted in such a location and manner that no fuel, oil, or other petroleum products may run off or be washed by rainfall into the water.

6. All appropriate best management practices shall be implemented throughout the project site to help minimize sediment disturbance and suspension within the water.

7. Any change in the project design, materials, or construction methods, must be approved by the Corps in writing.

Incidents where any individuals of federally listed threatened Central California Coast steelhead (*Oncorhynchus mykiss*), threatened Central Valley steelhead (*Oncorhynchus mykiss*) listed by NOAA Fisheries under the Endangered Species Act appear to be injured or killed as a result of discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States authorized by this NWP shall be reported to NOAA Fisheries, Office of Protected Resources at (301) 713-1401 and the Regulatory Office of the San Francisco District of the U.S. Army Corps of Engineers at (415) 503-6795. The finder should leave the plant or animal alone, make note of any circumstances likely causing the death or injury, note the location and number of individuals involved and, if possible, take photographs. Adult animals should not be disturbed unless circumstances arise where they are obviously injured or killed by discharge exposure, or some unnatural cause. The finder may be asked to carry out instructions provided by NOAA Fisheries, Office of Protected Resources, to collect specimens or take other measures to ensure that evidence intrinsic to the specimen is preserved.

You may refer any questions on this matter to Roberta Morganstern of my Regulatory staff by telephone at 415-503-6782 or by e-mail at Roberta.A.Morganstern@usace.army.mil. All correspondence should be addressed to the Regulatory Division, North Branch referencing the file number at the head of this letter.
The San Francisco District is committed to improving service to our customers. The Regulatory staff seeks to achieve the goals of the Regulatory Program in an efficient and cooperative manner, while preserving and protecting our nation’s aquatic resources. If you would like to provide comments on our Regulatory Program, please complete the Customer Service Survey Form available on our website: http://www.spn.usace.army.mil/Missions/Regulatory.aspx

Sincerely,

Roberta Morganstern
Project Manager, Regulatory Division

Enclosures

Copies Furnished electronically:

NMFS: Dan Logan: dan.logan@noaa.gov
CDFW: Timothy.Dodson@wildlife.ca.gov
Regional Water Quality Control Board: Christina.Toms@Waterboards.ca.gov
Applicant: David Nicholson: dnicholson@marincounty.org
Elizabeth Murray: Elizabeth.O.Murray@usace.army.mil
Enclosure 4

Permittee: David Nicholson for County of Marin

File Number: 2004-28601N

Certification of Compliance for Nationwide Permit

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

(Permittee)  (Date)

Return to:

Roberta Morganstern
U.S. Army, Corps of Engineers
San Francisco District
Regulatory Division, CESPN-R-N
1455 Market Street
San Francisco, CA 94103-1398