



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, PHILADELPHIA DISTRICT
WANAMKER BUILDING
100 PENN SQUARE EAST
PHILADELPHIA PA 19107-3390

MARCH 8, 2021

Mr. Ben Grumbles
Secretary of the Environment
Maryland Department of the Environment
1800 Washington Boulevard
Baltimore, MD 21230

Dear Secretary Grumbles:

The Baltimore District requested water quality certifications under Section 401 of the Clean Water Act (401 WQC) for the proposed issuance of those Nationwide Permits (NWP) that may result in a discharge in waters of the United States in the State of Maryland on October 15, 2020. On September 25, 2020, the Philadelphia District requested Coastal Zone Management Act (CZMA) consistency concurrences for the proposed issuance of the NWP in waters of the United States near and including the Chesapeake and Delaware Canal in Maryland. In the State of Maryland, the Philadelphia District implements the NWP program in waters of the United States near and including the Chesapeake and Delaware Canal in Maryland. Through the pre-filing meeting, the Maryland Department of the Environment (MDE) indicated that one response would be provided for the Baltimore and Philadelphia Districts 401 WQC and CZMA consistency concurrence requests.

On 15 December 2020, the State of Maryland granted, with conditions, 401 WQC for all NWP.

On January 13, 2021, the U.S. Army Corps of Engineers published a final rule in the Federal Register (86 FR 2744) announcing the reissuance of 12 existing NWP and the issuance of four new NWP, as well as the reissuance of NWP general conditions and definitions with some modifications. The NWP in this rule, along with these Regional Conditions, replace prior versions of the 2017 NWP. The remaining 40 NWP from 2017, 2017 General Conditions, and the 2017 Maryland Regional Conditions remain in effect through their scheduled March 18, 2022, expiration date. As such, this letter addresses only those NWP taking effect as published in the January 13, 2021 Federal Register (86 FR 2744).

The Philadelphia District has reviewed the granted 401 WQC for 16 NWP and has determined that the conditions upon which NWP were granted are inconsistent with the Environmental Protection Agency's (EPA's) regulations implementing Section 401, the Nationwide Permit rulemaking, and the Corps regulations governing the nationwide permit program. Furthermore, the Philadelphia District has reviewed the

CZMA consistency determinations for the NWP's and has determined that the conditions upon which NWP's were determined consistent with the CZMA are inconsistent with the Nationwide Permit rulemaking and the Corps regulations governing the nationwide permit program.

Specifically, WQC conditions #1 and #3 are invalid conditions because they undermine the finality of the WQC in a way that brings into question whether the State of Maryland has assured that all discharges that could be authorized under the NWP's will comply with water quality requirements. The EPA's preamble to the regulations implementing Section 401 makes it clear that certifying authorities cannot unilaterally modify a certification after it is issued or include "reopener" clauses in a certification. (85 Federal Register 42210, 42279.) It is only changes to the permit or underlying project that could trigger the requirement for a new or different certification than was originally issued. Conditions #1 and #3 constitutes a reopener or otherwise allows the certifying authority to review individual actions included in the certification to ensure that the activities comply with water quality standards. The requirements of conditions #1 and #3 are not valid under EPA's regulations implementing Section 401 and the WQC is clear that these requirements are necessary to ensure that the activities certified comply with water quality standards.

Specifically, WQC Special Conditions #4(b-d), WQC Special Condition #8(a), CZMA Condition #4(b-d), and CZMA Condition #20(a) are not acceptable because they require the Corps to alter its administration of the NWP's in a manner that is inconsistent with the regulations governing the regulatory program and with the rule establishing these nationwide permits. WQC Special Condition #4(b) and CZMA Condition #4(b) include requirements for additional compensatory mitigation when an activity results in a loss of stream bed or bank of 300 linear feet or greater or greater than 1/10 acre, whichever is less. This condition requires additional Corps review of compensatory mitigation plans in accordance with the 2008 Mitigation Rule even in cases when the Corps may determine that compensatory mitigation is not required because the proposed NWP activity results in no more than minimal adverse environmental effects. WQC Special Condition #4(c) and CZMA Condition #4(c) require compensatory mitigation for all losses at a ratio of 1:1 or its equivalent, necessitating the Corps to use a mitigation ratio of 1:1 or its equivalent when, under the 2008 Mitigation Rule, another ratio might be more appropriate. Furthermore, all losses of wetlands, including alteration of plant communities to a different vegetation type, must be offset by compensatory mitigation at amounts required under the State's regulations in accordance with WQC Special Condition #4(d) and CZMA Condition #4(d). These conditions require the District to administer mitigation beyond what the District has required in a manner inconsistent with the 2008 Mitigation Rule and the NWP mitigation requirements.

As such the Corps declines to rely on the certification for the 16 NWP's and will instead require individual WQCs and CZM or waiver for activities authorized by those NWP's.

In accordance with the Corps' regulations at 33 CFR 330.4(c), the Philadelphia District will not issue any authorization under NWP's until the certifying authority issues an individual 401 WQC for the specific activity or waives the right to do so. Anyone wanting to perform activities under NWP's must first obtain an activity-specific 401 WQC and CZM or waiver. The 401 WQC for any specific NWP affects only those activities which may result in a discharge; NWP's 55 and 56 continue to authorize activities which could not reasonably be expected to result in discharges into waters of the United States.

Thank you for your coordination and efforts on the re-issuance of the NWP's. If you have any questions on this matter please contact Todd A. Schaible, Chief, Regulatory Branch at (215) 656-6725 or todd.a.schaible@usace.army.mil.

Sincerely,



David C. Park
Lieutenant Colonel, Corps of Engineers
District Commander

cc:
Andy Beaudet, USACE
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