



DEPARTMENT OF THE ARMY
BALTIMORE DISTRICT, CORPS OF ENGINEERS
2 HOPKINS PLAZA
BALTIMORE, MD 21201

Regulatory Branch

March 8, 2021

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

Dear Secretary Grumbles,

The Baltimore District U.S. Army Corps of Engineers is finalizing 16 Nationwide Permit (NWP) activities in Maryland, Pennsylvania, and Washington, DC. Part of our review involves coordination with your agency regarding water quality certification and coastal zone management in Maryland waters except those within the Philadelphia District's area of responsibility. On September 30 and October 15, 2020, we requested Coastal Zone Management Act (CZMA) consistency and Water Quality Certification pursuant to Section 401 of the Clean Water Act (401 WQC), respectively. The Philadelphia District will be providing a separate response to the NWPs effective in its area of responsibility within the Chesapeake and Delaware Canal in the State of Maryland.

On December 15, 2020, the State of Maryland granted 401 WQC and CZMA consistency concurrence to the Baltimore District for all NWPs. On January 13, 2021, the U.S. Army Corps of Engineers published a final rule in the *Federal Register* (86 FR 2744) reissuing 12 existing NWPs and issuing four new NWPs. The Corps is not reissuing or modifying the remaining 40 existing NWPs or finalizing proposed NWP E at this time. Those 40 remaining NWPs continue to be in effect under the January 6, 2017 final rule and the certification and consistency concurrence decisions made for that rule.

The following 16 NWP activities were finalized on January 13, 2021: 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 55, 56, 57, and 58. Of these, NWPs 48, 55, and 56 will be in effect in Maryland. NWP 52 is in effect in tidal navigable waters of the U.S., but suspended in nontidal waters and wetlands. NWPs 12, 21, 29, 39, 40, 42, 43, 44, 50, 51, 57, and 58 will be suspended in Maryland.

I'd like to say again that my team and I recognize and appreciate all the efforts your staff made to act on the Corps' certification and consistency determination requests for the NWPs within a shorter than normal timeframe. Your willingness to prioritize our accelerated request highlights the positive working relationship between our agencies.

I asked my staff to consider every option when considering the concerns outlined in your letter dated February 12, 2021. Unfortunately, some of your requests 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. As such, we cannot accept your WQC and CZMA as currently written. Specific concerns were discussed with your staff on January 21, 2021 and documented in the following sections:

1. WQC Special Conditions #1 and #3 are invalid conditions because they undermine the finality of the WQC. EPA's preamble to the regulations implementing Section 401 clearly states that certifying authorities cannot unilaterally modify a certification after it is issued or include "reopener" clauses in a certification. Only changes to the permit or underlying project can trigger the requirement for a new or different certification. Special Conditions #1 and #3 constitute reopeners, which makes them invalid conditions for NWP.

2. WQC Special Conditions #4(b-d) and CZMA Condition #4(b-d) cannot be accepted because they require the Corps to alter its administration of the NWPs in a manner inconsistent with the regulations governing the regulatory program. For example, WQC Special Condition #4(b) and CZMA Condition #4(b) require 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. WQC Special Condition #4(c) and CZMA Condition #4(c) would require 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, WQC Special Condition #4(d) and CZMA Condition #4(d) require the Corps to administer mitigation in a manner inconsistent with the 2008 Mitigation Rule and the NWP mitigation requirements.

3. WQC Special Condition #8(a) and CZMA Condition #20(a) cannot be accepted because they require an applicant to submit a PCN to the Baltimore District for all commercial shellfish mariculture activities authorized under NWP 48. We have historically reviewed a wide range of proposals regarding commercial shellfish activities. Many of these activities are minor making it unreasonable for us to require a PCN without overstepping our regulatory requirements.

Our inability to accept your WQC and CZMA conditions for the NWPs will subsequently require individual WQCs (or waiver) and individual CZMA consistency concurrences (or presumption of concurrence) for applicable activities authorized by the NWPs. Declining to rely on the programmatic certification for these general permits will not adversely affect Maryland's rights under Section 401 of the Clean Water Act or the Coastal Zone Management Act. Current regulations prohibit us from authorizing any proposed NWP activity within the State of Maryland that may result in a discharge until the State issues or waives an individual 401 WQC and CZMA approval (where applicable). Bottom line is the State will have an opportunity to weigh in on each project that could be authorized under these NWPs in Maryland.

I appreciate your support and understanding regarding the NWPs, and have asked my staff to continue an open dialogue with your team in the hopes of improving working

relationships. I am confident we can overcome any challenges and understand the best chance for protecting Maryland waters is by working together.

If you have any questions on the status of the NWP's, please contact Dr. Daniel P. Swenson, Chief, Regulatory Branch at Daniel.P.Swenson@usace.army.mil or 410-962-4562.

Sincerely,

John T. Litz
Colonel, U.S. Army
Commander and District Engineer

Copy Furnished:

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