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DEPARTMENT OF STATE

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December 10, 2020

Mr. Stephan A. Ryba
Chief, Regulatory Branch
Department of the Army
New York District, Corps of Engineers
Jacob K. Javits Federal Building
New York, New York 10278-0090

Ms. Diane Kozlowski
Chief, Regulatory Branch
Department of the Army
Buffalo District, Corps of Engineers
1776 Niagara Street
Buffalo, New York 14207-3199

Re: **F-2020-0754 (DA)**

U.S. Army Corps of Engineers – Proposed 2020
New York and Buffalo Districts’ Regional Conditions, the
Reissuance and Modification of the Nationwide Permit
Program, the issuance of five new Nationwide Permits.
Statewide Coastal Areas

Dear Sir and Madam:

The Department of State (DOS) has completed its review of the U.S. Army Corps of Engineers (Corps) consistency determination indicating that the proposed reissuance and modification of its nationwide permits (NWPs) and issuance of five (5) new NWPs and proposed regional conditions, pursuant to 33 CFR Part 330 is and will be conducted in a manner consistent to the maximum extent practicable with the New York State Coastal Management Program.

I. Pursuant to 15 CFR § 930.41, DOS concurs with the Corps consistency determination for the following NWPs anywhere in the New York State coastal area

1. Aids to Navigation
4. Fish and Wildlife Harvesting, Enhancement and Attraction Devices and Activities
10. Mooring Buoys
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



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- 22. Removal of Vessels
- 24. Indian Tribe or State Administered Section 404 Programs
- 30. Moist Soil Management for Wildlife
- 31. Maintenance of Existing Flood Control Facilities
- 34. Cranberry Production Activities
- 37. Emergency Watershed Protection and Rehabilitation
- 41. Reshaping Existing Drainage Ditches
- 46. Discharges in Ditches
- 53. Removal of Low-Head Dams

II. Pursuant to 15 CFR § 930.41 and § 930.43 DOS concurs with the Corps' consistency determination for those NWP's with the additional condition(s), as follows:

3. Maintenance

DOS concurs with the Corps' consistency determination for NWP 3;

- For projects outside of Marine and Coastal District Waters (all tidal waters south of the Governor Mario M. Cuomo Bridge) within or affecting the NYS Coastal Area where the activities to be authorized primarily involve the repair/replacement in-place or landward of a lawful structure or fill, with no waterward expansion or increase in footprint;
- for projects authorized by New York State Department of Environmental Conservation (DEC) under [General Permit GP-0-20-004 Great Lakes Erosion Control General Permit](#);
- for projects proposed solely within the artificial canals identified by DOS at: <https://www.dos.ny.gov/opd/atlas/>.

6. Survey Activities

DOS concurs with the Corps' consistency determination for NWP 6 where the activities to be authorized would be limited to sample plots or transects for wetland delineations and historic resources surveys.

11. Temporary Recreational Structures

DOS concurs with the Corps' consistency determination for NWP 11 where the activities to be authorized are for structures that are in place for no more than 30 days in a given calendar year and are for non-residential purposes.

13. Bank Stabilization

DOS concurs with the Corps' consistency determination for NWP 13 where the activities would be authorized under [General Permit GP-0-20-004 Great Lakes Erosion Control General Permit](#) or would occur within the canals identified by DOS at: <https://www.dos.ny.gov/opd/atlas/> .

III. Pursuant to 15 CFR § 930.41 and § 930.43, DOS concurs with the Corps' consistency determination for the following NWP's where the activities would occur outside of the New York City Waterfront Revitalization Program:

- 2. Structures in Artificial Canals
- 9. Structures in Fleeting and Anchorage Areas
- 28. Modifications of Existing Marinas
- 35. Maintenance Dredging of Existing Basins
- 36. Boat Ramps

38. Cleanup of Hazardous and Toxic Waste

IV. Pursuant to 15 CFR § 930.41 and § 930.43 DOS objects to the Corps' consistency determination for the following NWP's anywhere in the New York coastal area:

- 5. Scientific Measuring Devices
- 7. Outfall Structures and Associated Intake Structures
- 8. Oil and Gas Structures on the Outer Continental Shelf
- 12. Oil or Natural Gas Pipeline Activities
- 14. Linear Transportation Projects
- 21 Surface Coal Mining Activities
- 23. Approved Categorical Exclusions
- 25. Structural Discharges
- 27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities
- 29. Residential Developments
- 32. Completed Enforcement Activities
- 33. Temporary Construction, Access, and Dewatering
- 39. Commercial and Institutional Developments
- 40. Agricultural Activities
- 42. Recreational Facilities
- 43. Stormwater Management Facilities
- 44. Mining Activities
- 45. Repair of Uplands Damaged by Discrete Events
- 48. Commercial Shellfish Aquaculture 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
- 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

Basis for Decision

The nationwide permits listed in **II, III, and IV** above could authorize activities which would be inconsistent with one or more of the State's CMP policies and federally approved amendments to the CMP. First, in II, where the listed conditions are not complied with, the activities should not be subject to a nationwide permit and if so conducted, would be inconsistent with the CMP. These activities would affect the State's CMP policies pertaining to water dependent uses (Policies #1, #2, #3, #4, #20, #21); appropriate development in appropriate areas and expediting permits for that development (Policies #1, #2, #5, #6); the protection, preservation, and where practicable restoration of State designated significant coastal fish and wild life habitats (Policy #7); the protection of fish and wildlife from pollutants and hazardous wastes (Policies #8, #31, #34, #35, #36, #38, #40); flooding and erosion hazards (Policies #11, #12, #13, #14, #15, #16, #17); infringements on the public use of coastal waters and water related recreational uses (Policies #19, #20, #21, #22); preventing the impairment of scenic resources (Policies #24 and #25); the conservation of agricultural lands (Policies #26, #35); the preservation and protection of freshwater and tidal wetlands and the benefits derived from them (Policy #44); and the protection of the quality of coastal waters (Policies #30, #31, #33, #34, #35, #36, #39).

These activities would also affect these policies as they are reflected in the Long Island Sound Regional Coastal Management Program and federally approved Local Waterfront Revitalization Programs.

Next, in **III**, where the activities would be located within the CMP special management area New York City Waterfront Revitalization Program (NYC WRP), the activities should not be subject to a nationwide or regional permit and if so conducted, would be inconsistent with the CMP. These activities would affect the NYC WRP policies pertaining to: water dependent uses (Policies #1, #2, #3, and #8); appropriate development in appropriate areas (Policies #1, #2, #3, #8, #9, and #10); the protection, preservation, and where practicable restoration of designated significant coastal fish and wildlife habitats (Policy #4); the protection of fish and wildlife from pollutants and hazardous wastes (Policies #4, #5, and #7); flooding and erosion hazards and increasing climate resilience (Policy #6); infringements on the public use of coastal waters and water related recreational uses (Policies #3, and #8); preventing the impairment of scenic resources (Policy #9); the preservation and protection of freshwater and tidal wetlands and the benefits derived from them (Policies #4, and #5); and the protection of the quality of coastal waters (Policies #4, #5, and #7).

Further, in **IV**, the activities should not be subject to a nationwide or regional permit and if so conducted, would be inconsistent with the CMP. These activities would affect the State's CMP policies pertaining to: water dependent uses (Policies #1, #2, #3, #4, #20, #21); appropriate development in appropriate areas and expediting permits for that development (Policies #1, #2, #5, #6); the protection, preservation, and where practicable restoration of State designated significant coastal fish and wild life habitats (Policy #7); the protection of fish and wildlife from pollutants and hazardous wastes (Policies #8, #31, #34, #35, #36, #38, #40); flooding and erosion hazards (Policies #11 , #12, #13, # 14, # 15, # 16, # 17); infringements on the public use of coastal waters and water related recreational uses (Policies #19, #20, #21 , #22); preventing the impairment of scenic resources (Policies 24 and 25); the conservation of agricultural lands (Policies #26, #35); the preservation and protection of freshwater and tidal wetlands and the benefits derived from them (Policy #44); and the protection of the quality of coastal waters (Policies #30, #31, #33, #34, #35, #36, #39). These activities would also affect these policies as they are reflected in the Long Island Sound Regional Coastal Management Program and federally approved Local Waterfront Revitalization Programs.

Finally, the NWP's listed in **II**, where the listed conditions are not complied with, **III**, where the activities would be located within the NYC Waterfront Revitalization Program, and **IV** above were determined not to be consistent to the maximum extent practicable with the State CMP policies for several reasons: 1) the specific nature of the authorized activity is unknown (e.g. structures in fleeting and anchorage areas, residential developments, approved categorical exclusions, completed enforcement actions); 2) the size, extent and duration of the authorized activity is limitless (e.g. utility line backfill and bedding, structural discharges, maintenance dredging of existing basins); 3) the established thresholds for an activity are excessive (e.g. bank stabilization, headwaters and isolated waters discharges, 1/2 acre loss of waters); 4) the provisions of the permits do not reflect the existing conditions of the geographic areas in which the authorized activity would occur; 5) coordinated review of authorized activities will be limited and expedited review by the Corps would exclude valuable local knowledge of on- site conditions and potential effects on local resources (e.g. water-based renewable energy); 6) the mitigation condition does not advocate "avoidance" and viable alternatives or advocating activities that would advance relevant CMP policies as the principal means of minimizing adverse effects on coastal waters, habitats, wetlands, scenic areas, special aquatic sites (mitigation banks vs. on-site mitigation) ; and 7) the authorized activities could be inconsistent with locally adopted and State and federally approved plans as expressed in federally approved amendments to the CMP.

Alternative Measures - Regional Conditions

Pursuant to 15 CFR § 930.43(a)(3), DOS should describe alternative measures which, if adopted by the Corps, would allow the Corps to proceed with the reissuance, modification, and issuance of new NWRPs in a manner consistent to the maximum extent practicable with the CMP. According to 33 CFR § 330.4(d)(2), the Division or District Engineers may establish regional conditions for NWRPs that would make them consistent with the CMP and as such, DOS is committed to developing regional conditions with the appropriate districts.

To ensure that the Corps' NWRPs and activities authorized by them would be consistent with the CMP and approved LWRPs, the following condition applies to:

- 1) the NWRPs listed in **II** above that do not meet the stated conditions and
- 2) the NWRPs listed in **III** when the activity to be authorized would occur within the NYC Waterfront Revitalization Program

And

- 3.) the NWRPs listed in **IV** above

Activities authorized pursuant to these Nationwide Permits shall be submitted to DOS for review by the applicant. DOS will review the proposed activities pursuant to 15 CFR Part 930 Subpart D. DOS concurrence with an applicant's consistency certification shall not be presumed unless DOS fails to concur with or object to an applicant's consistency certification within six (6) months of commencement of DOS' review of an applicant's consistency certification and all necessary data and information in accordance with 15 CFR § 930.62 or § 930.63.

Should you have any questions regarding this consistency decision please contact Matthew Maraglio (matthew.maraglio@dos.ny.gov) or Jennifer Street (jennifer.street@dos.ny.gov).

Sincerely

Kisha Santiago-Martinez
Deputy Secretary of State
Office of Planning, Development and Community
Infrastructure

KSM/rf

cc: OCM – Jeffery L. Payne - via e-mail
OCM – Kerry Kehoe, David Kaiser – via e-mail
COE/HQ – David B. Olson - via e-mail
COE/Buffalo District -Bridget Brown -via e-mail
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