



STATE OF NEW YORK
DEPARTMENT OF STATE
41 STATE STREET
ALBANY, NY 12231-0001

ELIOT SPITZER
GOVERNOR

LORRAINE A. CORTÉS-VÁZQUEZ
SECRETARY OF STATE

March 14, 2007

Mr. Tom Switala
Chief, Regulatory Branch
Department of the Army
Buffalo District, Corps of Engineers
1776 Niagara Street
Buffalo, New York 14207-3199

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

Re: F-2006-0931 (DA)
U.S. Army Corps of Engineers - Reissuance, Modification and
issuance of new Nationwide Permits and Conditions
Docket # COE-2006-0005
Statewide Coastal Areas
Restatement of Consistency Decision

Dear Mr. Switala and Mr. Tomer:

The Department of State has reviewed the final notice of the Reissuance of Nationwide Permits published in the Federal Register on March 12, 2007 (Volume 72, Number 47). The proposed activities and their coastal effects would not be substantially different than those considered in our December 8, 2006, decision regarding this matter. Therefore, our decision of December 8, 2006 (copy enclosed), remains in effect.

Sincerely,

Steven C. Resler
Deputy Bureau Chief, Resources Management Bureau
Section Chief, Consistency Review, Analysis, GIS and Special
Projects
New York State Coastal Management Program

Enclosure

cc: DEC/Central Office - John Ferguson



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DEPARTMENT OF STATE
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GEORGE E. PATAKI
GOVERNOR

CHRISTOPHER L. JACOBS
SECRETARY OF STATE

December 8, 2006

Mr. Tom Switala
Chief, Regulatory Branch
Department of the Army
Buffalo District, Corps of Engineers
1776 Niagara Street
Buffalo, New York 14207-3199

Mr. Richard Tomer
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Re: F-2006-0931 (DA)
U.S. Army Corps of Engineers - Reissuance, Modification
and issuance of new Nationwide Permits and Conditions
Docket # COE-2006-0005
Statewide Coastal Areas

Dear Mr. Switala and Mr. Tomer:

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 six (6) new NWPs 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 Part 930.41, the DOS concurs with the Corps consistency determination for the following NWPs:
2. Structures in Artificial Canals
 4. Fish and Wildlife Harvesting, Enhancement and Attraction Devices and Activities
 5. Scientific Measuring Devices
 10. Mooring Buoys
 15. U.S. Coast Guard Approved Bridges
 20. Oil Spill Cleanup
 21. Surface Coal Mining Operations
 24. Indian Tribe or State Administered Section 404 Program
 34. Cranberry Production Activities
 35. Emergency Watershed Protection and Rehabilitation
 - C. Pipeline Safety Program Designated Time Sensitive Inspections and Repairs
 - E. Coal Remining Activities
 - F. Underground Coal Mining Activities

II. The DOS concurs with the Corps consistency determination for the following NWP's where the activities to be authorized would be conducted within canals that are more than fifty percent (50%) bulkheaded (see III below regarding NWP #3 and NWP A, and IV below regarding NWP #13):

- 3. Maintenance
- 13. Bank Stabilization
- A. Emergency Repair Activities

III. The DOS concurs with the Corps consistency determination for the following NWP's where the activities to be authorized would occur outside of areas covered by the following CMP special management areas: 1) The Long Island Sound Regional Coastal Management Program; 2) Local Waterfront Revitalization Programs; 3) Significant Coastal Fish and Wildlife Habitats; 4) Scenic Areas of Statewide Significance; and 5) Harbor Management Plans.

However, pursuant to 15 CFR Parts 930.41 and 930.43, the DOS objects to the Corps consistency determination for the following NWP's where the activities would occur within the above listed special management areas:

- 1. Aids to Navigation
- 3. Maintenance (except in canals that are more than 50% bulkheaded - see II above)
- 6. Survey Activities
- 7. Outfall Structures and Associated Intake Structures
- 9. Structures in Fleeting and Anchorage Areas
- 11. Temporary Recreational Structures
- 12. Utility Line Activities
- 14. Linear Transportation Projects
- 16. Return Water From Upland Contained Disposal Areas
- 18. Minor Discharges
- 19. Minor Dredging
- 22. Removal of Vessels
- 23. Approved Categorical Exclusions
- 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 Activities
- 32. Completed Enforcement Activities
- 33. Temporary Construction, Access and Dewatering
- 35. Maintenance Dredging of Existing Basins
- 36. Boat Ramps
- 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
- A. Emergency Repair (except in canals that are more than 50% bulkheaded - see II above)
- B. Discharges into Ditches and Canals
- D. Commercial Shellfish Aquaculture Activities

IV. The DOS also objects to the Corps consistency determination for the following NWP anywhere in the New York coastal area:

8. Oil and Gas Structures
13. Bank Stabilization (except in canals that are more than 50% bulkheaded - see II above)
17. Hydropower Projects

Basis for Decision

The nationwide permits listed in 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. In III, where the activities would be located within the CMP special management areas, 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 wildlife 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.

The NWPs listed in III, where the activities would be located within the CMP special management areas, 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 or extent 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); 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 which may affect land and water uses and natural resources in the coastal area of New York State will be limited; 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; 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 Part 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 NWPs 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 NWPs that would make them consistent with the CMP.

To ensure that the Corps' NWPs and activities authorized by them would be consistent with the CMP and approved LWRPs, the following conditions should apply to: 1) the NWPs listed in III above that would occur in the listed CMP special management areas; and 2) the NWPs listed in IV above, except for NWPs #3 and #13 when the activities authorized by them would occur in canals that are more than fifty percent (50%) bulkheaded (see item II above):

Within thirty (30) days of receipt by DOS of an applicant's submission, which should include a complete joint New York State Department of Environmental Conservation and U.S. Army Corps of Engineers Permit Application, completed Federal Consistency Assessment Form, and all information and data necessary to assess the effects of the proposed activity on and its consistency with the CMP, including location maps and photographs of the site where the activity is proposed, DOS will inform the applicant and the Corps whether:

- 1) Necessary data and information is missing from the applicant's submission. If so, the DOS will notify the applicant and the Corps of the missing necessary data and information, and state that the DOS review will not commence until the date the necessary data and information is provided;
- 2) The activity meets the General Concurrence criteria set forth in the CMP and therefore, further review of the proposed activity by the DOS, and the DOS concurrence with an individual consistency certification for the proposed activity, are not required; or
- 3) DOS review of the proposed activity and DOS concurrence with the applicant's consistency certification is necessary. If DOS indicates review of the activity and a consistency certification for it is necessary, the activity shall not be authorized by NWP or other form of Corps authorization unless DOS concurs with an applicant's consistency certification, in accordance with 15 CFR Part 930, Subpart D, or unless DOS indicates the activity meets CMP General Concurrence criteria (see item 2 above).

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 Parts 930.62 or 930.63.

Should you have any questions regarding this consistency decision or wish to meet to discuss the coastal management concerns and implement the alternative measures this Department has identified, please contact Steven Resler at (518) 473-2470 (e-mail: sresler@dos.state.ny.us).

Sincerely,



George R. Stafford
Director

- c: OCRM - David Kennedy
COE/Buffalo District - Diane Kozlowski
COE/ New York District - Michael Vissichelli
NYSDEC/Albany - William Little