



Public Notice

U.S. Army Corps of Engineers, Norfolk District

March 1, 2021

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NORFOLK DISTRICT'S FINAL REGIONAL CONDITIONS, 401 WATER QUALITY CERTIFICATION, AND COASTAL ZONE MANAGEMENT ACT DETERMINATION FOR THE SIXTEEN 2021 NATIONWIDE PERMITS

The purpose of this Public Notice is to provide an update on Norfolk District's Final Regional Conditions, the Section 401 Water Quality Certification (WQC) and the Coastal Zone Management Act (CZMA) determination for the reissuance of 12 existing nationwide permits (NWP) and four new NWP published as a final rule in the *Federal Register* (86 FR 2744) on January 13, 2021. The Norfolk District received the CZMA determination on December 17, 2020 and the Section 401 WQC on December 21, 2020 from the Commonwealth of Virginia for the 16 NWP and the regional conditions applicable in Virginia, including the Northern Virginia Military Installations within Baltimore District's Area of Responsibility. The Section 401 WQC and CZMA determination were provided for the entire set of NWP proposed in the September 15, 2020 *Federal Register* (85 FR 57298). However, Norfolk District developed new regional conditions to address only the Section 401 WQC and the CZMA conditions for the 16 NWP finalized in the January 13, 2021 *Federal Register*.

The Norfolk District has reviewed the granted 401 WQC for NWP 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 55, 56, 57, and 58 and has determined that some of the conditions upon which NWP 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 55, 56, 57, and 58 were granted are inconsistent with the Nationwide Permit rulemaking and the Corps regulations governing the nationwide permit program. Some of the 401 WQC Conditions A. 1-12 require the Corps to alter its administration of the NWP in a manner that is inconsistent with the regulations governing the regulatory program and with the rule establishing these nationwide permits. In addition, some of the conditions may be outside the Corps' authority to enforce. Norfolk District declined to accept Section 401 WQC Conditions A. 1-12 for the applicable 16 NWP, but accepted Condition A. 13, which requires applicants to obtain a Virginia Water Protection (VWP) permit or waiver from DEQ for the project or activity. This condition applies to NWP 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 55, 56, 57, and 58. Activities impacting wetlands or state waters above certain thresholds for NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 will require individual 401 WQC as outlined below and specified in the Norfolk District Regional Conditions.

- 1) Activities under NWP 21 that impact more than 300 linear feet of stream bed or stream channel as defined in 9VAC25-210-10.

- 2) Activities under NWP 29 that cumulatively impact more than 1/10 of an acre of wetlands or open water or more than 300 linear feet of stream bed or stream channel as defined in 9VAC25-210-10.
- 3) Activities under NWP 39 that cumulatively impact more than 1/10 of an acre of wetlands or open water or more than 300 linear feet of stream bed or stream channel, as defined in 9VAC25-210-10.
- 4) Activities under NWP 40 that cumulatively impact more than 300 linear feet of stream bed or stream channel, as defined in 9VAC25-210-10 or activities under NWP 40 that increase the capacity of an impoundment or reduce instream flows.
- 5) Activities under NWP 42 that cumulatively impact more than 1/10 of an acre of wetlands or open water or more than 300 linear feet of stream bed or stream channel, as defined in 9VAC25-210-10.
- 6) Activities under NWP 43 that cumulatively impact more than 1/10 of an acre of wetlands or open water or more than 300 linear feet of stream bed or stream channel, as defined in 9VAC25-210-10.
- 7) Activities under NWP 44 that impact more than 300 linear feet of stream bed or stream channel, as defined in 9VAC25-210-10.
- 8) Activities under NWP 50 that impact more than 300 linear feet of stream bed or stream channel, as defined in 9VAC25-210-10.
- 9) Activities under NWP 51 that cumulatively impact more than 1/10 of an acre of wetlands or open water or more than 300 linear feet of stream bed or stream channel, as defined in 9VAC25-210-10.
- 10) Activities under NWP 52 that cumulatively impact more than 1/10 of an acre of wetlands or more than 300 linear feet of stream bed or stream channel, as defined in 9VAC25-210-10.

DEQ has denied 401 WQC for certain activities under NWP 12. Therefore, an individual 401 WQC (or waiver) from the DEQ is required for any applicant to the Federal Energy Regulatory Commission (FERC) for a certificate of public convenience and necessity pursuant to § 7c of the federal Natural Gas Act (15 USC § 717f(c)) to construct any natural gas transmission pipeline greater than 36 inches in diameter.

Norfolk District has reviewed the granted 401 WQC for NWP 12 and has determined that some of the conditions upon which NWPs 12 were granted are inconsistent with the Nationwide Permit rulemaking and the Corps regulations governing the nationwide permit program. We determined that some of the 401 WQC Conditions 12-2 through 12-16 require the Corps to alter its administration of the NWPs in a manner that is inconsistent with the regulations governing the regulatory program and with the rule establishing these nationwide permits. In addition, some of the conditions may be outside the Corps' authority to enforce. Norfolk District declined to accept conditions 12-2 through 12-16, but accepted condition 12-17, which requires applicants to obtain a Virginia Water Protection (VWP) permit or waiver from DEQ for the project or activity.

Submitting your PCN to DEQ at the same time as the Corps may expedite the review process for projects that require a VWP permit or waiver. If an individual 401 WQC is required, applicants must follow the process outlined in the Clean Water Act Section 401 Certification Rule published in the *Federal Register* (85 FR 42210) on July 13,

2020.

Norfolk District considered all public comments as well as federal and state agency comments and revised the regional conditions as appropriate. The “NAO Final Regional Conditions -16 NWP” are attached and also available on our webpage at:

<http://www.nao.usace.army.mil/Missions/Regulatory.aspx>

NWPs 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 55, 56, 57, and 58 and the Norfolk District Regional Conditions for these 16 NWP are effective on March 15, 2021, and will expire on March 14, 2026. The 2017 versions of NWPs 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, and 52 expire on March 14, 2021. Activities that were authorized by the 2017 NWPs, but no longer qualify for authorization under any of the 12 existing NWPs that are reissued in this final rule, continue to be authorized by the 2017 NWP(s) for 12 months as long as those activities have commenced (i.e., are under construction) or are under contract to commence in reliance upon an NWP prior to March 14, 2021.

There are 40 existing NWPs that were not reissued or modified by the January 13, 2021 final rule. Those 40 NWPs were published in the January 6, 2017, issue of the Federal Register (82 FR 1860) and those NWPs remain in effect until the Corps issues a final rule reissuing those NWPs or March 18, 2022, whichever comes first. The original regional conditions, 401 WQC and CZMA conditions remain in effect for those 40 NWPs.

If you have any questions, please contact Melissa Nash at (757) 201-7489 or by email at melissa.a.nash@usace.army.mil or the Regulator of the Day at 757-201-7652.

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