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December 14, 2020

**Via Email**

Benjamin A. Bennett  
Colonel, U.S. Army  
District Commander  
Wilmington District, Corps of Engineers  
69 Darlington Avenue  
Wilmington, NC 28403-1343

**SUBJECT: Consistency Concurrence regarding the proposed reissuance of the Draft Nationwide Permits (NWP), including draft regional conditions, in North Carolina (DCM#2020043)**

Dear Colonel Bennett:

The Division of Coastal Management (DCM) received the U.S. Army Corps of Engineers (Corps) Coastal Zone Management Act (CZMA) federal consistency determination regarding the reissuance of existing Nationwide Permits (NWPs), proposed new draft NWPs, and draft corresponding regional conditions on September 30, 2020. The Corps federal consistency determination granted a 90-day review period with a deadline of December 29, 2020. DCM acknowledged this review period through an email dated October 20, 2020. DCM has reviewed the proposed reissuance of the NWPs, new draft NWPs and draft regional conditions, and this letter serves as the State's federal consistency concurrence.

North Carolina's coastal zone management program consists of, but is not limited to, the Coastal Area Management Act, the State's Dredge and Fill Law, Chapter 7 of Title 15A of North Carolina's Administrative Code, and the land use plan of the County and/or local municipality. It is the objective of DCM to manage the State's coastal resources to ensure that proposed Federal activities would be compatible with safeguarding and perpetuating the biological, social, economic, and aesthetic values of the State's coastal waters.

Based upon comments received from the NC Division of Marine Fisheries (DMF, attached), and based upon DCM's experience with expanding marine aquaculture activities in North Carolina, DCM has concerns regarding the proposed NWP A and B for finfish and seaweed mariculture. The NC General Assembly (NCGA) established standards and procedures in N.C.G.S. § 113-201 et seq. that provide for the leasing of public bottom for shellfish mariculture. The NC Marine



Fisheries Commission (MFC) also established requirements and procedures in 15A NCAC 03O .0200 to ensure shellfish mariculture standards are being met, while considering other uses of the public trust. State law requires that the DMF Director, through the authority delegated from the Secretary of the Department of Environmental Quality, grant shellfish leases only if they are compatible with utilization by the public of other marine and estuarine resources. To determine compatibility, the minimum standards provided are used to discern suitable areas for shellfish mariculture based on numerous factors, including water quality, ability to cultivate shellfish, existing shellfish resources on the proposed area, and existing navigation, fishing and recreation. Shellfish mariculture leases can often conflict with other public trust uses, which makes balancing issues and determining compatibility challenging.

Currently, there are no finfish or seaweed mariculture operations in the estuarine or marine waters of North Carolina's coastal zone and DMF does not have a permitting process for these types of mariculture leases. However, in 2017, the NCGA passed N.C.G.S. § 113-215-218, which similarly allows and defines marine aquaculture leases for cultivating marine aquatic species other than molluscan shellfish (seaweed and finfish). Unlike the state shellfish mariculture statutes (N.C.G.S. § 113-201 et seq.), these marine aquaculture statutes do not provide for any additional rulemaking by the MFC to ensure the standards are being met, while also considering other uses of the public trust.

NWPs are intended to streamline permitting for project types that have been previously implemented, where there is a level of confidence in project specifications and conditions needed to minimize risk of adverse environmental and economic impacts. Therefore, it seems premature to streamline permitting of projects through NWPs for which state and federal agencies and the public have no prior experience in North Carolina. In addition, the proposed NWP language regarding geographic areas where finfish and seaweed mariculture can occur is unclear. NWP A (seaweed) states "marine" waters, while NWP B (finfish) states "marine and estuarine." However, both proposed the NWP A and B would generally authorize structures in "navigable waters of the United States", and based on recent discussions with the Wilmington District, it is our understanding that both are intended to apply anywhere within estuarine and marine waters.

While NWPs A and B require the permittee to submit a pre-construction notification (PCN) to the district engineer, a more thorough coordinated review by state and federal resource agencies is critical and a public notification process should also be required. Factors to consider when considering seaweed or finfish mariculture facilities include anchoring impacts, water quality impacts, user conflicts, introductions and accidental releases of cultured organisms, and the introduction of pathogens and parasites that cause disease. Siting factors for consideration include minimum water depth, adequate current, sufficient nutrients, wave exposure, impacts to critical habitat, and minimum clearance below the surface and above the seafloor. For these reasons, DCM strongly recommends that the Corps coordinate with DMF and other relevant agencies to develop appropriate regional conditions for both of these new NWPs.

DCM also has significant concerns regarding the process exercised by the Corps for this federal consistency review. The Corps and DCM mutually agreed to a review period of 90 days at the outset of this review. However, on December 9, 2020, 71 days after entering into that agreement, the Corps unexpectedly required DCM to conclude its review by December 14, 2020 –



unilaterally removing two weeks from the federal consistency review period and forcing DCM to respond within three business days. This shortened timeframe for the State's review violates CZMA regulations, which authorize federal agencies and states to mutually agree to a different timeline from the default set out by regulation, and do not authorize federal agencies to unilaterally change the review period (15 CFR § 930.36(b)(2)).

By changing the review process at the eleventh hour, the Corps also appears to have violated its obligations under the federal Administrative Procedures Act (APA) to provide clear and reliable notice of "the time, place, and nature of public rule making proceedings" (5 U.S.C. § 553(b)(1)). DCM relied on the time period announced and mutually agreed upon with the District to complete its analysis, and has not had adequate "opportunity to participate in the rule making through submission of written data, views, or arguments" when its response must be rushed to completion (5 U.S.C. § 553(c)).

Finally, the Corps submitted draft NWP's and regional conditions that, in our understanding, have not yet been finalized. If the final NWP's or Regional Conditions are significantly modified from those submitted for the State's review, or if further assessments reveal environmental effects affecting any coastal use or resource substantially different than originally described, the Corps will have a statutory obligation under the CZMA to submit a supplemental consistency determination pursuant to 15 CFR 930.46 or new consistency determination pursuant to 15 CFR 930.36.

This entire process has been highly unusual and not in accordance with procedures outlined in the federal CZMA, APA, and corresponding federal regulations described above. Given the lack of time needed for further coordination and discussions between our agencies, along with the potential implications that if the State does not respond by December 14, 2020, the Corps may not make NWP's available to the public in the coastal counties of North Carolina or may treat our response as a general objection, DCM must prematurely conclude that the proposed draft NWP's and accompanying (draft) Regional Conditions are consistent with North Carolina's approved coastal management program.

Thank you for your consideration of the North Carolina Coastal Management Program.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Govoni", written in a cursive style.

Daniel Govoni  
Federal Consistency Coordinator

Cc: Braxton Davis, DCM Director  
Sheila Holman, Assistant Secretary for the Environment, NCDEQ