



Department of Public Service

Three Empire State Plaza, Albany, NY 12223-1350
www.dps.ny.gov

Public Service Commission

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December 14, 2020

Via Email and US Mail

Stephan A. Ryba, Chief
Regulatory Branch
New York District, U.S. Army Corps of Engineers
Jacob K. Javits Federal Building
26 Federal Plaza
New York, NY 10278-0090

Diane Kozlowski, Chief
Regulatory Branch
Buffalo District, U.S. Army Corps of Engineers
1776 Niagara Street
Buffalo, NY 14207-3199

Re: **Section 401 Water Quality Certification Decision
US Army Corps of Engineers Nationwide Permits**

Dear Mr. Ryba and Ms. Kozlowski,

On September 15, 2020, the United States Army Corps of Engineers (Corps) published a notice in the Federal Register (Vol. 85, No. 179) announcing its proposal to reissue and modify its Nationwide Permits issued pursuant to Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act (Nationwide Permits). The notice also indicated that each Corps' district office would request Section 401 Water Quality Certifications for the proposed Nationwide Permits from the certifying agencies.

Subsequent to the Federal Register notice, joint requests for Section 401 Water Quality Certification (Water Quality Certification) on the proposed Nationwide Permits were sent from the New York and Buffalo Corps Districts to the New York State Department of Public Service (DPS), that serves as the staff to the New York State Public Service Commission (PSC).

This letter constitutes a response from the PSC. This Water Quality Certification decision is being provided on the proposed Nationwide Permits and there currently is no date certain for the Corps to finalize and issue the Nationwide Permits. In addition, this Water Quality Certification decision is based on the Nationwide Permits as described in the

Federal Register notice, including the scope of authorized activities for each permit and the general conditions that would apply to all permits. Because the date for finalization of the Applicable Nationwide Permits is unknown, the effective date and expiration date of this Water Quality Certification decision will be concurrent with the effective date and expiration date of final Nationwide Permits. However, in the event any final Applicable Nationwide Permits include substantial changes in the scope of the proposed Nationwide Permit activities or their associated conditions, the PSC reserves its rights to revoke or modify this Water Quality Certification decision.

The PSC will require individual Water Quality Certifications for all projects in New York State that are subject to review and approval by the PSC pursuant to the New York State Public Service Law (PSL) Article VII. As a result, the PSC hereby denies the request for Water Quality Certification for all the Applicable Nationwide Permits listed in Attachment 1 of this letter that may apply to activities undertaken pursuant to PSL Article VII (Siting of Major Utility Transmission Facilities). The basis for this denial is provided in Attachment 1 to this letter.

The PSC notes that the New York State Department of Environmental Conservation (DEC) issued its last Water Quality Certification decision on the Nationwide Permits March 7, 2017, effective March 19, 2017 through March 18, 2022. Unless and until the proposed Nationwide Permits are finalized, the PSC understands that the 2017 Nationwide Permits remain in effect, along with DEC's 2017 Water Quality Certification decision.

If you have any questions, please feel free to contact me.

Sincerely,



Robert Rosenthal
General Counsel
Public Service Commission

Attachment 1 - PSC Denial of Water Quality Certification

ATTACHMENT 1

The New York State Public Service Commission (PSC) hereby denies Section 401 Water Quality Certification (Water Quality Certification) for activities undertaken pursuant to the Nationwide Permits listed below, as they relate to the construction and operation of major natural gas or electric transmission facilities subject to New York State Public Service Law (PSL) Article VII. Any party conducting activities authorized by these Nationwide Permits, where the PSC is the certifying authority, must apply for and obtain an individual Water Quality Certification from the PSC in accordance with procedures at 40 CFR 121, and New York State PSL Article VII (Siting of Major Utility Transmission Facilities). For any Nationwide Permits not listed below, Water Quality Certification is not applicable.

- NWP 3. Maintenance
- NWP 5. Scientific Measurement Devices
- NWP 6. Survey Activities
- NWP 7. Outfall Structures and Associated Intake Structures
- NWP 12. Oil or Natural Gas Pipeline Activities
- NWP 13. Bank Stabilization
- NWP 15. U.S. Coast Guard Approved Bridges
- NWP 16. Return Water From Upland Contained Disposal Areas
- NWP 18. Minor Discharges
- NWP 19. Minor Dredging
- NWP 20. Response Operations for Oil or Hazardous Substances
- NWP 23. Approved Categorical Exclusions
- NWP 26 (Reserved)
- NWP 27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities
- NWP 30. Moist Soil Management for Wildlife
- NWP 33. Temporary Construction, Access, and Dewatering
- NWP 36. Boat Ramps
- NWP 37. Emergency Watershed Protection and Rehabilitation
- NWP 38. Cleanup of Hazardous and Toxic Waste
- NWP 40. Agricultural Activities
- NWP 41. Reshaping Existing Drainage Ditches
- NWP 42. Recreational Facilities
- NWP 43. Stormwater Management Facilities
- NWP 44. Mining Activities
- NWP 45. Repair of Uplands Damaged by Discrete Events
- NWP 46. Discharges in Ditches
- NWP 47. (Reserved)
- NWP 51. Land-Based Renewable Energy Generation Facilities
- NWP 52. Water-Based Renewable Energy Generation Pilot Projects
- NWP 53. Low-Head Dam Removal
- NWP 54. Living Shorelines
- NWP C. Electric Utility Line and Telecommunications Activities
- NWP D. Utility Line Activities for Water and Other Substances

Basis for Denial of Water Quality Certification

In accordance with 40 CFR § 121.7(e)(2)(i-iii) , the PSC denial of Water Quality Certification is based on the following:

1. State water quality standards for Water Quality Certification found in 301-303, 306 and 307 of the Federal Water Pollution Control Act, as implemented in New York State by the following provisions:
 - a. Effluent limitations and water quality-related effluent limitations set forth in section 750-1.11 of Title 6 of New York Codes Rules and Regulations (6 NYCRR);
 - b. Water quality standards and thermal discharge criteria set forth in Parts 701, 702, 703 and 704 of 6 NYCRR;
 - c. Standards of performance for new sources set forth in section 750-1.11 of 6 NYCRR;
 - d. Effluent limitations, effluent prohibitions and pretreatment standards set forth in section 750-1.11 of 6 NYCRR;
 - e. Prohibited discharges set forth in section 750-1.3 of 6 NYCRR; and
 - f. State statutes, regulations and criteria otherwise applicable to such activities, including showings required by 16 NYCRR part 86.5; provisions of PSL § 120 et. seq., and findings required by PSL § 126(c) and (g).
2. Reasons why water quality standards are not met. Given the nature and scope of projects subject to review under PSL Article VII, these projects require an individual assessment of compliance with water quality standards based on project- and site-specific circumstances. Reasons why an individual assessment of compliance with water quality standards is necessary include, among other things, as follows. Projects seeking certification by the PSC are not required to provide final facilities' design and environmental control and mitigation plans until after siting authorization has been issued based on preliminary design information, and as such water quality impacts cannot generally be determined until final design has been provided and demonstration of compliance with certificate conditions and applicable NYS water quality standards has been made. The major electric or gas transmission facilities subject to PSC jurisdiction are large and complex projects involving consideration of primary and potential alternatives including site location, facility design, control technology and impact avoidance, minimization or mitigation measures, and cost constraints to minimize effects on utility ratepayers. In addition, most major transmission project proposals exceed threshold criteria associated with CWA Section 404 applicability for wetlands fill and streambank disturbance. The Corp.'s consideration of each stream crossing or wetland impact area on linear projects as a stand-alone project does not account for impacts on an individual watershed or even single waterbody basis.
3. Under PSL Article VII, the application would be required to provide additional information to determine whether water quality standards are met, including: final approved facility location and layout; final facility design plans; identification of site-

specific control technology and impact avoidance, minimization and/or mitigation measures, including wetlands mitigation plans; and detailed erosion and sedimentation control plans for all areas of disturbance.

