STATE OF NEW YORK
DEPARTMENT OF STATE
ONE COMMERCE PLAZA
99 WASHINGTON AVENUE
ALBANY, NY 12231-0001
WWW.DOS.NY.GOV

ANDREW M. CUOMO
GOVERNOR

ROSSANA ROSADO
SECRETARY OF STATE

March 17, 2017

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-2016-1155 (DA)
U.S. Army Corps of Engineers – Final
New York and Buffalo Districts' Regional Conditions, the Reissuance and Modification of the Nationwide Permit Program, the issuance of two new Nationwide Permits and one new General Condition.
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 two (2) 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 Part 930.41, the DOS concurs with the Corps consistency determination for the following NWPs anywhere in the New York State coastal area with which all general and all Buffalo and New York District regional conditions are complied:

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
21. Surface Coal Mining Operations
22. Removal of Vessels
23. Approved Categorical Exclusions
24. Indian Tribe or State Administered Section 404 Programs
30. Moist Soil Management for Wildlife
31. Maintenance of Existing Flood Control Facilities
33. Temporary Construction, Access, and Dewatering
34. Cranberry Production Activities
37. Emergency Watershed Protection and Rehabilitation
40. Agriculture Activities
41. Reshaping Existing Drainage Ditches
46. Discharges in Ditches
49. Coal Remining Activities
50. Underground Coal Mining Activities
53. Removal of Low-Head Dams

II. Pursuant to 15 CFR Part 930.41 and 930.43 the DOS concurs with the Corps' consistency determination for those NWPs with which all general and all Buffalo and New York District regional conditions are complied and with the additional condition(s), as follows:

3. Maintenance

The DOS concurs with the Corps' consistency determination for NWP 3 outside of tidal wetlands and within the NYS Coastal Area where the activities to be authorized would; involve the repair/replacement in-place or landward, with no waterward expansion or increase in footprint; or for those proposed within the artificial canals identified by DOS at: https://appext20.dos.ny.gov/coastal_map_public/map.aspx.

11. Temporary Recreational Structures

The DOS concurs with the Corps' consistency determination for NWP 11 where the activities to be authorized are not seasonal structures.

13. Bank Stabilization

The DOS concurs with the Corps' consistency determination for NWP 13 where the activities to be authorized would occur within the canals identified by DOS at: https://appext20.dos.ny.gov/coastal_map_public/map.aspx.

III. Pursuant to 15 CFR Parts 930.41 and 930.43, the DOS concurs with the Corps' consistency determination for the following NWPs 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 Parts 930.41 and 930.43 the DOS objects to the Corps' consistency determination for the following NWPs anywhere in the New York coastal area:

5. Scientific Measuring Devices
6. Survey Activities
7. Outfall Structures and Associated Intake Structures
8. Oil and Gas Structures on the Outer Continental Shelf
12. Utility Line Activities
14. Linear Transportation Projects
25. Structural Discharges
27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities
29. Residential Developments
32. Completed Enforcement Activities
39. Commercial and Institutional Developments
42. Recreational Facilities
43. Stormwater Management Facilities
44. Mining Activities
45. Repair of Uplands Damaged by Discrete Events
48. Commercial Shellfish Aquaculture Activities
51. Land-Based Renewable Energy Generation Facilities
52. Water-Based Renewable Energy Generation Pilot Projects
54. Living Shorelines

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, #8, and their associated subpolicies); appropriate development in appropriate areas (Policies #1, #2, #3, #8, #9, #10 and their associated subpolicies); the protection, preservation, and where practicable restoration of State designated significant coastal fish and wildlife habitats (Policy #4 and associated subpolicies); the protection of fish and wildlife from pollutants and hazardous wastes (Policies #4, #5, #7 and associated subpolicies); flooding and erosion hazards and increasing climate resilience (Policy #6 and associated subpolicies); infringements on the public use of coastal waters and water related recreational uses (Policies #3, #8, and associated subpolicies); preventing the impairment of scenic resources (Policy #9 and associated subpolicies); the preservation and protection of freshwater and tidal wetlands and the benefits derived from them (Policies #4, #5, and associated subpolicies); and the protection of the quality of coastal waters (Policies #4, #5, #7, and associated subpolicies).

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 NWPs 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 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, 1/2 acre loss of waters, 300 lf of bank stabilization); 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 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 and as such, DOS is committed to developing regional conditions with the appropriate districts.

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

l) the NWPs listed in **II** above that do not meet the stated conditions
and
2) the NWPs listed in **III** when the activity to be authorized would occur within the NYC Waterfront Revitalization Program
And
3.) the NWPs 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 Parts 930.62 or 930.63.

Should you have any questions regarding this consistency decision please contact Jeffrey Zappieri at (518) 473-2476 (e-mail: Jeffrey.Zappieri@dos.ny.gov).

Sincerely

Sandra Allen
Deputy Secretary of State

SA/mm

c: OCRM -David Kennedy -via e-mail
COE/HQ – David B. Olson – via e-mail
COE/Buffalo District -Bridget Brown -via e-mail
COE/New York District -Brian Orzel-via e-mail
NYSDEC/Central Office -Kent Sanders via e-mail