



# COMMONWEALTH of VIRGINIA

## DEPARTMENT OF ENVIRONMENTAL QUALITY

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L. Preston Bryant, Jr.  
Secretary of Natural Resources

David K. Paylor  
Director

(804) 698-4000  
1-800-592-5482

April 20, 2007

Colonel Dionysios Anninos  
District Commander  
U. S. Army Corps of Engineers  
Norfolk District, Fort Norfolk  
803 Front Street  
Norfolk, Virginia 23510-1096

### **RE: Section 401 Water Quality Certification for 2007 Nationwide Permit Program**

Dear Colonel Anninos:

This is the Commonwealth of Virginia's decision with regard to §401 Water Quality Certification for activities authorized by the U.S. Army Corps of Engineers (USACE) Nationwide Permits (NWP), and Norfolk District Regional Conditions. These NWPs were published in Part II of the *Federal Register* on March 12, 2007, with an effective date of March 19, 2007. The Norfolk District Regional Conditions were public noticed on October 13, 2006. The Commonwealth supports the issuance and use of nationwide and regional permits to expedite the processing of permits while safeguarding the environment and reducing duplication of effort by government regulatory agencies.

Pursuant to Virginia Water Protection (VWP) Permit Regulation 9VAC 25-210-130H, the State Water Control Board is issuing this final §401 Water Quality Certification as meeting the requirements of the VWP regulation after advertising and accepting public comment for 30 days on our intent to provide this certification.

The State Water Control Board hereby provides unconditional §401 Water Quality Certification for all of the Norfolk District Regional Conditions and for the following Nationwide Permits, as meeting the requirements of the Virginia Water Protection Permit Regulation, which serves as the Commonwealth's §401 Water Quality Certification:

NWP 1: *Aids to Navigation*

NWP 2: *Structures in Artificial Canals*

- NWP 3: *Maintenance*
- NWP 4: *Fish & Wildlife Harvesting, Enhancement, & Attraction Devices & Activities*
- NWP 5: *Scientific Measurement Devices*
- NWP 6: *Survey Activities*
- NWP 8: *Oil and Gas Structures*
- NWP 9: *Structures in Fleeting and Anchorage Areas*
- NWP 10: *Mooring Buoys*
- NWP 11: *Temporary Recreational Structures*
- NWP 13: *Bank Stabilization*
- NWP 15: *U.S. Coast Guard Approved Bridges*
- NWP 20: *Oil Spill Cleanup*
- NWP 21: *Surface Coal Mining Activities*
- NWP 22: *Removal of Vessels*
- NWP 23: *Approved Categorical Exclusions*
- NWP 28: *Modifications of Existing Marinas*
- NWP 30: *Moist Soil Management for Wildlife*
- NWP 31: *Maintenance of Existing Flood Control Facilities*
- NWP 33: *Temporary Construction, Access and Dewatering*
- NWP 34: *Cranberry Production Activities*
- NWP 35: *Maintenance Dredging of Existing Basins*
- NWP 36: *Boat Ramps*
- NWP 37: *Emergency Watershed Protection and Rehabilitation*
- NWP 38: *Cleanup of Hazardous and Toxic Waste*
- NWP 41: *Reshaping Drainage Ditches*
- NWP 45: *Repair of Uplands Damaged by Discrete Events*
- NWP 46: *Discharges Into Ditches*
- NWP 47: *Pipeline Safety Program Designated Time Sensitive Inspections & Repairs*
- NWP 49: *Coal Re-mining Activities*
- NWP 50: *Underground Coal Mining Activities*

Unless otherwise covered under of the Norfolk District State Program General Permit SPGP-01, or other subsequent SPGPs, the State Water Control Board hereby provides §401 Water Quality Certification for the following Nationwide Permits as meeting the requirements of the Virginia Water Protection Permit Regulation, which serves as the Commonwealth's §401 Water Quality Certification provided that any compensatory mitigation meets the requirements in the Code of Virginia, Section 62.1-44.15:5.E:

- NWP 14: *Linear Transportation Projects*
- NWP 39: *Commercial and Institutional Developments*
- NWP 29: *Residential Developments*

The State Water Control Board hereby provides conditional §401 Water Quality Certification for the following Nationwide Permits provided that any compensatory mitigation meets the requirements in the Code of Virginia, Section 62.1-44.15:5E and as detailed below:

NWP 7: *Outfall Structures and Maintenance*, provided that the structure or maintenance are not associated with intake structures

NWP 12: *Utility Line Activities*, provided that the activities are not associated with intake structures or do not transport non-potable raw surface water

NWP 18: *Minor Discharges*, provided that the discharge does not include water withdrawals, such as the construction of an intake structure, weir or water diversion structure

NWP 19: *Minor Dredging*, provided that dredging is not used to create a deep space for water withdrawal

NWP 25: *Structural Discharges*, provided that the discharge does not include structures such as pilings to construct a platform to mount a pump for water withdrawals

NWP 27: *Stream and Wetland Restoration Activities*, provided that : (1) when used to permit a wetland mitigation bank, compensation for any surface water impacts is debited from the bank credits.; (2) natural stream design shall be used for stream restoration projects; (3) monitoring for success of these sites shall be conducted including submittal of as-built plans, surveys, and photographs.

NWP 32: *Completed Enforcement Actions*, provided that the impact does not exceed 2 acres of wetlands or 1500 linear feet of streambed and only past unauthorized impacts are addressed.

NWP 40: *Agricultural Activities*, except for the location of concentrated animal feeding operations or waste storage facilities in surface waters.

NWP 42: *Recreational Facilities*, provided that: (1) the facility does not include an impoundment for irrigation; (2) compensation is required for wetland and/or stream loss due to direct impacts and permanent backflooding.

NWP 43: *Stormwater Management Facilities*, provided that the facility is not associated with a water withdrawal

NWP 44: *Mining Activities*, provided that the activity is not for hydraulic dredging

NWP 48: *Commercial Shellfish Aquaculture Activities*, provided that the activity complies with the conditions of any VPDES permit issued for the facility

The following Nationwide Permit is not currently applicable in the Commonwealth and therefore does not require §401 Certification:

NWP 24: *Indian Tribe or State Administered Section 404 Programs*

The State Water Control Board denies §401 Water Quality Certification for the following Nationwide Permits, as these types of projects require individual review under state laws:

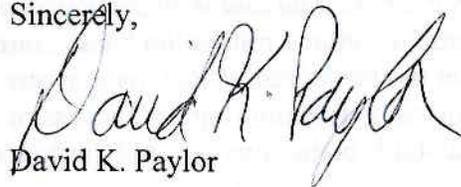
NWP 16: *Return Water from Upland Contained Disposal Sites*

NWP 17: *Hydropower Projects*

As to the exceptions for activities that would otherwise qualify for one of these Nationwide Permits, the State will continue to process applications for individual §401 Certification through a Virginia Water Protection General or Individual Permit pursuant to 9VAC 25-210-10 et seq. To accomplish our goal of individual review of certain activities, the Commonwealth is requesting that the Corps forward to the Department of Environmental Quality pre-construction notifications for any activities that fall into an excepted category.

Thank you for your continuing cooperation in the administration of the Joint Permit Program.

Sincerely,



David K. Paylor

cc: The Honorable L. Preston Bryant, Jr.,  
Secretary of Natural Resources  
Steven G. Bowman, Commissioner,  
Virginia Marine Resource Commission



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Secretary of Natural Resources

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May 7, 2007

Colonel Dionysios Anninos  
District Engineer/Commanding Officer  
U.S. Army Corps of Engineers, Norfolk District  
803 Front Street (Fort Norfolk)  
Norfolk, Virginia 23510

RE: **Federal Consistency Determination (and Federal Register Notice) for  
Re-issuance and Modification of Nationwide Permits  
DEQ-07-047F**

Dear Colonel Anninos:

The Commonwealth of Virginia has completed its review of the federal consistency determination concerning the re-issuance of existing Nationwide Permits (NWP). The Department of Environmental Quality is Virginia's lead agency for coordinating of federal consistency reviews under the Virginia Coastal Resources Management Program. The following state agencies joined in the review of the federal consistency determination:

- Department of Environmental Quality (hereinafter "DEQ")
- Department of Game and Inland Fisheries
- Department of Agriculture and Consumer Services
- Department of Conservation and Recreation:
- Department of Health
- Department of Transportation
- Department of Historic Resources
- Department of Forestry
- Department of Mines, Minerals, and Energy.

In addition, the Marine Resources Commission and the Virginia Institute of Marine Science were invited to comment.

DEQ did not solicit the comments of coastal localities or planning district commissions in this case.

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### Description of Action

The Army Corps of Engineers has re-issued its NWP's pursuant to section 404 of the Clean Water Act. According to the Federal Register dated March 12, 2007 (Volume 72, Number 47, pages 11092-11198, hereinafter cited as "Notice"), this action includes re-issuance of 43 existing NWP's, 26 existing general conditions, and many definitions with some modifications. It also includes issuance of 6 new NWP's, 2 new general conditions, and 13 new definitions (Notice, page 11092, left and center columns, and your March 15, 2007 letter to the Secretary of Natural Resources, hereinafter "March 15 letter"). The re-issuance occurred on March 12, 2007 according to the Notice, because the earlier NWP's expired on March 18, 2007; the new conditions took effect on March 19 (page 11092, center column).

According to your March 15 letter, the Federal Register publication on March 12 constitutes the Corps determination of federal consistency under the Coastal Zone Management Act for NWP activities within or affecting the coastal zone in the Commonwealth, as well as the Corps application to DEQ for section 401 water quality certification under the Clean Water Act. The Corps expressed willingness to add regional conditions to address state water quality standards and to ensure consistency with the Virginia Coastal Resources Management Program ("VCP"), as well as its belief that the NWP's, as reissued, meet state water quality standards and are consistent with the VCP. (We note that the Commonwealth's State Water Control Board has issued section 401 water quality certification in a letter dated April 20, 2007; see "Federal Consistency...", item 2, below.)

### Federal Consistency under the Coastal Zone Management Act

Pursuant to the Coastal Zone Management Act of 1972, as amended, federal activities located inside or outside of Virginia's designated coastal management area that can have reasonably foreseeable effects on coastal resources or coastal uses must, to the maximum extent practicable, be implemented in a manner consistent with the Virginia Coastal Resources Management Program (VCP). The VCP consists of a network of programs administered by several agencies. The DEQ's Office of Environmental Impact Review (OEIR) coordinates the review of federal consistency determinations with agencies administering the Enforceable and Advisory Policies of the VCP.

DEQ-OEIR published notice of this review on its web site from March 21 through April 23, 2007. We received one comment, from the Fairfax County Department of Public Works and Environmental Service. See item 6, below.

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Based on the information submitted and the comments of reviewing agencies, we concur that the proposed activity is consistent with the Virginia Coastal Resources Management Program, provided that the Corps and NWP holders comply with all applicable requirements and with the recommendations herein. The applicable requirements to which we refer include, but are not limited to, the following:

- The section 401 (Clean Water Act) certification provided by DEQ's Division of Water Quality, Office of Wetlands and Water Protection on behalf of the State Water Control Board (copy enclosed) (see further discussion in item 2, below);
- The permitting requirements for encroachments on subaqueous lands and tidal wetlands administered by the Marine Resources Commission pursuant to *Virginia Code* sections 28.2-1200 et seq. and 28.2-1300 et seq. (see item 3, below); and
- The land use and development performance criteria in the Chesapeake Bay Designation and Management Regulations (9 VAC 10-20-110 through -150) administered by the Department of Conservation and Recreation's Division of Chesapeake Bay Local Assistance pursuant to the Chesapeake Bay Preservation Act (*Virginia Code* sections 10.1-2100 et seq.).

Discussion of particular enforceable policies follows.

**1. Fisheries Management.** According to the Department of Game and Inland Fisheries, the re-issuance of the NWPs is consistent with the fisheries management enforceable policy of the Virginia Coastal Resources Management Program, provided that the Corps includes regional or special conditions designed to minimize potential adverse effects due to in-stream activities or intake structures.

**2. Wetlands Management.** DEQ's Division of Water Resources and its Northern Virginia, Tidewater, and Piedmont Regional Offices defer to its Division of Water Quality, Office of Wetlands and Water Protection (hereinafter "Division of Water Quality") with regard to re-issuance of the NWPs.

DEQ's Division of Water Quality administers the NWPs and interacts with the Corps for the Commonwealth. DEQ, on behalf of the State Water Control Board, has issued a section 401 Water Quality Certification for the NWPs (DEQ

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letter to Corps, dated April 20, 2007, copy attached; hereinafter cited as "DEQ Letter").

The section 401 water quality certification took different actions for different NWP's.

*(a) Unconditional Certification.* The section 401 water quality certification provided unconditional certification for all the Norfolk District Regional Conditions and for a number of NWP's; see DEQ letter, pages 1-2.

*(b) Certification for NWP's Covered by State Program General Permits.* The DEQ letter certified three NWP's that may be covered by State Program General Permits, provided that any compensatory mitigation meets the requirements in *Virginia Code* section 62.1-44.15:5.E. These NWP's are:

NWP 14, Linear Transportation Projects;  
NWP 29, Residential Developments; and  
NWP 39, Commercial and Institutional Developments.

*(c) Conditional Certification.* The section 401 water quality certification provided conditional certification for a number of NWP's, provided that any compensatory mitigation meets requirements in *Virginia Code* section 62.1-44.15:5E; see DEQ letter, pages 2-3.

*(d) Denial of Certification and Requirement for Individual Permits.* The State Water Control Board denied certification for two NWP's covering activities which require individual permits. These are:

NWP 16, Return Water from upland Contained Disposal Sites, and  
NWP 17, Hydropower Projects.

See "Regulatory and Coordination Needs," item 4, below.

**3. Subaqueous Lands Management.** The Marine Resources Commission, pursuant to *Virginia Code* sections 28.2-1200 et seq., has jurisdiction over any encroachments in, on, or over any state-owned rivers, streams, or creeks in the Commonwealth. Accordingly, if any portion of any project covered by any of the NWP's involves any encroachments channelward of ordinary high water along natural rivers and streams, or channelward of mean low water in tidal waters, a permit may be required from the Commission. See "Regulatory and Coordination Needs," item 3, below.

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**4. Air Pollution Control.** DEQ's Air Division has no comments on the re-issuance of the NWP's.

**5. Coastal Lands Management.** The Department of Conservation and Recreation, including its Division of Chesapeake Bay Local Assistance, had no comments on the re-issuance of the NWP's.

**6. Public Comments.** As mentioned above, this Office received comments from Fairfax County's Department of Public Works and Environmental Services (hereinafter "County") that were directed toward the proposed section 401 certification, which was also the subject of a public notice. The County specifically addressed NWP 27 (conditionally certified by DEQ's Division of Water Quality; see DEQ Letter and item 2(c), above), which covers stream and wetland restoration activities (see Notice, page 11119, left column through page 11123, center column), and stated that projects obtaining a NWP 27 that are not done for purposes of mitigation should be given unconditional section 401 water quality certification, stating that projects not for mitigation work act to increase the health of state waterways. The County indicates that the Corps review process ensures that such projects are beneficial, and that meeting the state's proposed regulations will dampen the effect of such beneficial projects. DEQ's water quality certification, as provided to the Corps on April 20, included provisos relating to wetland mitigation banks (compensation for surface water impacts is to be debited from bank credits), natural design mandated for restoration projects, and a monitoring requirement.

#### Advisory Policies and Other Environmental Issues

**1. Historic Properties.** Under the terms of a 1996 inter-agency Programmatic Agreement, the majority of the actions permitted under the NWP system are considered to have little or no potential to affect historic properties. The Programmatic Agreement was signed by the Army Corps of Engineers ("Corps"), the federal Advisory Council on Historic Preservation ("Advisory Council"), and the Virginia Department of Historic Resources ("DHR," also known as the State Historic Preservation Office). As a result of the determination of little or no impact by these agencies, a number of NWP's were categorically excluded from review pursuant to section 106 of the National Historic Preservation Act. The Corps agreed to consult with respect to several other NWP's; and future commitments were made. The DHR File Number for this review is 2007-0328.

**(a) Categorically excluded NWP's.** The Corps, DHR, and the ACHP agreed to categorically exclude the following NWP's from review under section 106:

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- NWP 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 21, 22, 25, 28, 31, 33, 35, 37, 40, and 41.

*(b) Permits Not Applicable in Virginia.* The following NWPs are also categorically excluded from section 106 review because they were determined not applicable to reviews in Virginia:

- NWPs 23, 24, 34, and 39.

*(c) Permits Requiring Corps Consultation.* According to DHR, the Corps has agreed to consult with DHR concerning the issuance of the following NWPs, which allow actions that may affect historic properties:

- NWP 13: Bank Stabilization
- NWP 14: Linear Transportation Projects
- NWP 27: Aquatic Habitat Restoration, Establishment, and Enhancement Activities
- NWP 29: Residential Developments
- NWP 30: Moist Soil Management for Wildlife
- NWP 32: Completed Enforcement Actions
- NWP 36: Boat Ramps
- NWP 38: Clean-up of Hazardous and Toxic Wastes
- NWP 42: Recreational Facilities
- NWP 43: Stormwater Management Facilities
- NWP 44: Mining Activities.

Some of these NWPs received unconditional certification from DEQ's Division of Water Quality, while others received conditional certification (see DEQ Letter, enclosed).

*(d) Future Actions.* DHR states that it is working with the Corps and the ACHP to amend and update the Programmatic Agreement. During this process, DHR will consider the new NWPs, #45-50, and determine whether any or all of these may be categorically excluded from review. Actions permitted under these NWPs continue to require consultation under section 106, until they are determined to be categorically excluded. See "Regulatory and Coordination Needs," item 1, below.

**2. Waste Management: Choice of Fill Material.** DEQ's Tidewater Regional Office recommends that the filling of any site be limited to the use of non-contaminated soils and/or inert materials such as rocks, brick block, or road pavement. The use of putrescible solid waste, land-clearing debris, vegetative

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waste, construction and demolition debris, or any other waste would require a solid waste permit pursuant to the Virginia Solid Waste Management Regulations (9 VAC 20-80).

*3. Threatened and Endangered Plant and Insect Species.* The Department of Agriculture and Consumer Services has no comments on this subject in connection with the re-issuance of NWP.

*4. Department of Transportation (VDOT) Concerns regarding NWP 14.* The Department of Transportation asked that the previous NWP 14 process for authorizing linear transportation projects be restored, because that process involves fewer administrative requirements than the State Program General Permit process.

As indicated in the DEQ Letter (page 2), the State Water Control Board provided section 401 certification for NWP 14, unless the projects are otherwise covered under SPGP-01 or a subsequent SPGP. This certification is provided that any compensatory mitigation meets the requirements of *Virginia Code* section 62.1-44.15:5.E., which sets out a scheme for compensatory mitigation. One of the circumstances in which a mitigation bank is to be allowed is when the impacts will result from a VDOT linear project. The regulation implementing these provisions, 9 VAC 25-210-115 sets out ways to evaluate compensatory mitigation proposals (sub-section B.3) and in-lieu fee funds as compensatory mitigation (sub-section E), and states that the mitigation bank must be ecologically preferable to practicable on-site and off-site individual compensatory mitigation options (sub-section F.2.), *inter alia*.

*5. No Objections.* The Department of Conservation and Recreation's Dam Safety Division and the Department of Health have no objections to the re-issuance of NWPs. The Department of Mines, Minerals, and Energy states that the NWP re-issuance will not affect mineral resources.

*6. No Comments.* The Department of Conservation and Recreation, Department of Forestry, and DEQ's Air Division have no comments.

#### Regulatory and Coordination Needs

*1. Historic Resources Consultation under Section 106.* The Corps should maintain coordination with DHR with regard to the programmatic agreement, to activities under the group of NWPs requiring consultation ("Advisory Policies...", item 1(c), above), and/or to activities permitted by NWPs #45-50 ("Advisory

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Policies," item 1(d), above). The DHR contact is Joanna Wilson (telephone (804) 367-2323, extension 140).

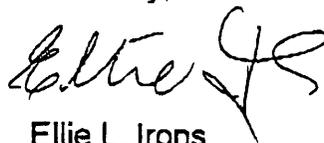
2. *Solid Waste Management.* As indicated above ("Advisory Policies...", item 2), in the event filling of a site is not by non-contaminated soils or inert materials, the Corps or its permittee must comply with the Virginia Solid Waste Management Regulations (9 VAC 20-80). Questions on applicable permitting requirements should be directed to DEQ's Tidewater Regional Office (Maria Nold, Deputy Regional Director, telephone (757) 518-2173).

3. *Subaqueous Lands Encroachment.* Applicants for coverage under any of the NWP's should ensure that their projects meet permitting requirements if encroachments are contemplated (see "Federal Consistency...", item 3, above). To ensure compliance and appropriate permitting, applicants should contact the Marine Resources Commission (Tony Watkinson, telephone (757) 247-2200).

4. *Individual Water Protection Permits.* For activities under NWP's 16 and 17, and for other excepted activities, DEQ's Water Quality Division requests that the Corps provide pre-construction notifications in order to ensure that individual permit review of certain activities is accomplished (see "Federal Consistency...", item 2, above). Notifications may be provided to DEQ's Water Quality Division (David Davis, telephone (804) 698-4105 or e-mail [ddavis@deq.virginia.gov](mailto:ddavis@deq.virginia.gov)).

Thank you for the opportunity to review this action. If you have questions, please feel free to contact me (telephone (804) 698-4325) or Charles Ellis of this Office (telephone (804) 698-4488).

Sincerely,



Ellie L. Irons  
Program Manager  
Office of Environmental Impact Review

enclosures

cc: (next page)

Colonel Dionysios Anninos  
Page 9

cc: Andrew K. Zadnik, DGIF  
Keith R. Tignor, VDACS  
Robert S. Munson, DCR  
Charles Banks, DCR-DDS  
Susan E. Douglas, VDH-ODW  
Kotur S. Narasimhan, DEQ-AQD  
Joseph P. Hassell, DEQ-DWR  
Thomas A. Faha, DEQ-NVRO  
Mark Alling, DEQ-PRO  
Michelle R. Hollis, DEQ-TRO  
David L. Davis, DEQ-DWQ-OWWP  
Tracy Harmon, VDOT  
Earl T. Robb, VDOT  
Mary T. Stanley, VDOT  
Tony Watkinson, MRC  
Joanna Wilson, DHR  
Matthew Heller, DMME  
Todd A. Groh, DOF  
David L. O'Brien, VIMS  
Chad P. Crawford, Fairfax County DPWES

## **Regional Conditions for the 2007 Nationwide Permits (NWP)**

### **NWP 5 Scientific Measurement Devices**

#### **Condition for Construction or Installation of Subaqueous Turbines**

Notification is required if a project proponent proposes the construction or installation of subaqueous turbines, because this work may have more than minimal impacts and the work will need to be coordinated with the resource agencies.

### **NWP 7 Outfall Structures and Associated Intake Structures**

#### **Conditions for Intakes in Anadromous Fish Waters**

When an intake is proposed in designated anadromous fish waters, the following design parameters will be incorporated as permit conditions to protect the sensitive life stages of anadromous fish.

- 1) Screening over the mouth of the intake with mesh size that does not exceed 1mm.
- 2) Intake velocities that do not exceed 0.25 feet per second.
- 3) Intake must be positioned such that an unimpeded flow of water parallel to the screen surface occurs along the entire surface of the screen to take advantage of sweeping velocity.

### **NWP 10 Mooring Buoys**

#### **Condition for Sufficient Mooring Depths**

Water depths in the mooring areas should be sufficient that vessels moored float at all stages of the tide. Boats should not hit bottom during low water conditions.

### **NWP 11 Temporary Recreational Structures**

#### **Condition for Sufficient Mooring Depths**

Water depths in the mooring areas should be sufficient that structures moored float at all stages of the tide or stoppers must be utilized to prevent the structures from resting on the bottom, so as to not damage the underlying benthic communities. Structures should not hit bottom during low water conditions.

### **NWP 12 Utility Line Activities**

#### **Conditions Specific to NWP 12**

1. Construction of access roads is limited to 1/3 acre of impacts to waters of the United States.

2. Notification is required for discharges associated with the construction of utility line substations that result in the loss of greater than 5000 square feet of waters of the United States.

3. For utility activities requiring notification the permittee shall submit the following information:

a. A map of the entire utility corridor including a delineation of all wetlands and waters of the United States within the corridor. Aquatic resource information shall be submitted using the Cowardin Classification System mapping conventions (e.g. PFO, PEM, POW, etc.).

b. An alternatives analysis, which specifically addresses the following:

i. Selection of an alignment, which avoids and minimizes wetland impacts to the maximum extent practicable. The utility line should make a direct or perpendicular crossing of a stream. Directional drilling is the preferred method of installation when possible, especially in tidal waters.

ii. Selection of an alignment, which avoids fragmenting large tracts of forested wetlands by routing utility lines outside of forested tracts or on the edges of forested tracts.

iii. Minimizing clearing of wetlands. Grubbing shall be limited to the permanent easement for underground utility lines. Outside of the permanent easement, wetland vegetation shall be removed at or above the ground surface unless written justification is provided and the impacts are reviewed and approved by the Corps.

iv. For overhead utility lines, allow natural succession to restore and maintain the corridor in scrub-shrub wetlands except for a minimum corridor needed for access, to the maximum extent practicable.

v. For buried utility lines allowing natural succession to restore the area to tree and scrub/shrub except for a 20-foot wide access corridor, to the maximum extent practicable.

4. For all submerged utility lines across navigable waters of the United States, a location map and cross-sectional view showing the utility line crossing from bank to bank is required. In addition, the location and depth of the Federal Project Channel shall be shown in relation to the proposed utility line. In general, all utility lines shall be buried at least 6 feet below the authorized bottom depth of Federal project channel and at least 3 feet below the bottom depth in all subaqueous areas. When circumstances prevent the placement of at least three feet of cover over the line (outside of the Federal Project

Channel), then written justification and an alternative method must be provided with the notification and the deviation must be reviewed and approved by the Corps.

5. Whenever possible, excavated material shall be placed on an upland site. However, when this is not feasible, temporary stockpiling is hereby authorized provided that:

a. All excavated material stockpiled in a vegetated wetland area is placed on filter cloth, mats, or some other semi-permeable surface. The material will be stabilized with straw bales, filter cloth, etc. to prevent reentry into the waterway.

b. All excavated material must be placed back into the trench to the original contour and all excess excavated material must be completely removed from the wetlands within 30 days after the pipeline has been laid through the wetlands area. Permission must be granted by the District Engineer or his authorized representatives if the material is to be stockpiled longer than 30 days.

6. When open-cut trenching in designated anadromous fish areas or hydrostatic testing of a pipeline involving water withdrawals from tidal waters are proposed, the Corps will coordinate with the National Marine Fisheries Service and/or the Virginia Department of Game and Inland Fisheries. In most cases, the following time-of-year restrictions will apply:

- James River, below Rt. 17 bridge: No TOYR
- James River, at Jamestown Island (Gray's Creek) downstream to Rt. 17 bridge: Feb. 15-June 15
- James River, at Jamestown Island upstream to Boshers Dam: Feb. 15-June 30
- James River, above Boshers (including Rivanna River): March 15-June 30
- Rappahannock River, below Route 360 bridge: Feb. 15-June 15
- York River, below Route 33 bridge: Feb. 15-June 15
- Nansemond River: Feb. 15-June 15
- Elizabeth River: No TOYR until further data are collected on fish movements and spawning.
- Unless otherwise noted, Feb. 15-June 30

### **NWP 23 Approved Categorical Exclusions Conditions Specific to NWP 23**

1. The use of this Nationwide Permit applies to the entire project addressed in the Categorical Exclusion prepared by another Federal agency. This nationwide permit cannot be used separately at individual crossings/impact areas of a single project. However, multiple crossings/impact areas of a single project can be authorized by this nationwide permit provided the combined impacts of all crossings/impact areas do not exceed the thresholds described below. This nationwide permit cannot be used in combination with other nationwide permits for a single project.

2. The discharge does not cause a combined loss due to the entire project of greater than ½ acre of wetlands.

3. The permittee must notify the District Engineer if there is a discharge in special aquatic sites, including wetlands, and/or resulting in combined impacts to more than 300 linear feet of streambed due to the entire project (send notification to the Norfolk District Corps of Engineers, Regulatory Branch, 803 Front St., Norfolk, VA 23510-1096). Written verification from this office must be received before performing the proposed work. The notification must be in writing and include the following information (the Joint Permit Application may also be used; the Virginia Department of Transportation may use their application form):

- Name, address, and telephone number of the prospective permittee.
- Location of the proposed project.
- Vicinity map and project drawings on 8.5-inch by 11-inch paper (plan view, profile, & cross section).
- Brief description of the proposed project and the project purpose.
- A delineation of wetlands.

When we receive all required information, the Corps will notify the prospective permittee within 45 days either that the project may proceed under the nationwide permit or that an individual permit is required. If, after reviewing the notification, the District Engineer determines that the proposed activity would have more than a minimal individual or cumulative adverse impact on the aquatic environment or otherwise may be contrary to the public interest, then he will either condition the nationwide permit authorization to reduce or eliminate the adverse impacts, or notify the prospective permittee that the activity is not authorized by the nationwide permit and will provide the permittee with instructions on how to seek authorization under an individual permit. If the permittee is not notified otherwise within the 45-day period, the permittee may presume the activity is authorized under this NWP.

4. The notification must include a compensatory mitigation proposal to offset permanent losses of waters of the United States to ensure that those losses result in minimal adverse effects to the aquatic environment and a statement describing how losses of waters of the United States will be avoided and minimized to the maximum extent practicable. Compensation will be required for any single impact to a stream of greater than 300 linear feet. For projects where the combined impacts to streams due to the entire project exceed 300 linear feet, but no single impact exceeds 300 linear feet, the Corps will determine on a case-by-case basis whether compensation for stream impacts is required.

## **The following conditions are applicable to multiple NWP's.**

### **1. Waters Containing Submerged Aquatic Vegetation (SAV) Beds**

This condition applies to: NWP's 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 22, 23, 25, 27, 28, 31, 32, 33, 35, 36, 37, 38, 45, and 48.

Notification is required if work will occur in areas that contain submerged aquatic vegetation (SAVs). Information about SAVs can be found at the Virginia Institute of Marine Science's website <http://www.vims.edu/bio/sav/>. Additional avoidance and minimization measures, such as relocating a structure or time of year restrictions may be required to reduce impacts to SAVs.

### **2. Designated Critical Resource Waters, which include National Estuarine Research Reserves**

Notification is required for work under NWP's 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38 in the Chesapeake Bay National Estuarine Research Reserve in Virginia. This multi-site system along a salinity gradient of the York River includes Sweet Hall Marsh, Taskinas Creek, Catlett Island, and Goodwin Islands. More information can be found at: <http://www.vims.edu/cbnerr/reservesites/index.htm>.

NWP's 7, 12, 14, 16, 17, 31, and 35 do not apply in the Chesapeake Bay National Estuarine Research Reserve in Virginia.

### **3. Waters with federally listed endangered or threatened species, waters federally designated as Critical Habitat, and one mile upstream (including tributaries) of any such waters**

Notification is required for work in the areas listed below for NWP's 3, 4, 5, 6, 7, 12, 13, 14, 16, 17, 18, 19, 21, 23, 25, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 49, and 50 for the Counties of Lee, Russell, Scott, Tazewell, Wise, and Washington in Southwestern Virginia within the following specific waters and reaches:

- 1) Powell River - from the Tennessee-Virginia state line upstream to the Route 58 bridge in Big Stone Gap and one mile upstream of the mouth of any tributary adjacent to this portion of the River.
- 2) Clinch River - from the Tennessee-Virginia state line upstream to Route 632 at Pisgah in Tazewell County and one mile upstream of the mouth of any tributary adjacent to this portion of the River, the Little River to its confluence with Maiden Spring Creek, and one mile upstream of the mouth of any tributary adjacent to this portion of Little River.

- 3) North Fork Holston River - from the Tennessee-Virginia state line upstream to the Smyth County/Bland County line and one mile upstream of any tributary adjacent to this portion of the River.
- 4) Copper Creek - from its junction with the Clinch River upstream to the Route 58 bridge at Dickensonville in Russell County and one mile upstream of any tributary adjacent to this portion of the Creek.
- 5) Indian Creek - from its junction with the Clinch River upstream to the fourth Norfolk and Western Railroad bridge at Van Dyke in Tazewell County and one mile upstream of the mouth of any tributary adjacent to this portion of the Creek.
- 6) Middle Fork Holston River - from the Tennessee-Virginia state line to its junction with Walker Creek in Smyth County near Marion, Virginia.
- 7) South Fork Holston River - from its junction with Middle Fork Holston River upstream to its junction with Beech Creek in Washington County.

For the above listed NWP's that require notification to work in Lee, Russell, Scott, or Wise Counties, please submit the notification to the Norfolk District Corps of Engineers, Clinch Valley Field Office, POB 338, Abingdon, Virginia 24210. For the above listed NWP's that require notification to work in Smyth, Tazewell, or Washington Counties please submit the notification to the Norfolk District Corps of Engineers, Walker Mountain Field Office, POB 694, Wytheville, Virginia 23482. Written verification from these offices would be required prior to performing the proposed work. It is recommended that the prospective permittees first contact the field offices by telephone at (276) 623-5259 (Clinch Valley) or (276) 228-4592 (Walker Mountain) to determine if the notification procedures would apply. The notification must be in writing and include the following information (the Joint Permit Application may also be used - be sure to mark it with the letters PCN at the top of the first page):

- Name, address, and telephone number of the prospective permittee.
- Location of the proposed project.
- Vicinity map and project drawings on 8.5-inch by 11-inch paper (plan view, profile, & cross section).
- Brief description of the proposed project and the project purpose.
- Where required by the terms of the nationwide permit, a delineation of affected special aquatic sites, including wetlands.

When all required information is received by the appropriate field office, the Corps will notify the prospective permittee within 45 days whether the project may proceed under the nationwide permit or whether an individual permit is required. If, after reviewing the notification, the District Engineer determines that the proposed activity would have more than a minimal individual or cumulative adverse impact on the aquatic environment or otherwise may be contrary to the public interest, then he will either condition the nationwide permit authorization to reduce or eliminate the adverse impacts, or notify the prospective permittee that the activity is not authorized by the nationwide permit and provide the permittee with instructions on how to seek authorization under an individual permit.

Non-federal permittees shall notify the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. The district engineer will determine whether the proposed activity “may affect” or will have “no effect” to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps’ determination within 45 days of receipt of a complete pre-construction notification. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the project, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification the proposed activities will have “no effect” on listed species or critical habitat, or until Section 7 consultation has been completed.

#### **4. Designated Trout Waters**

Notification is required for work in the areas listed below for NWP 3, 4, 5, 6, 7, 12, 13, 14, 16, 17, 18, 19, 21, 23, 25, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 49, and 50.

This condition applies to activities occurring in two categories of waters; Class V (Put and Take Trout Waters) and Class VI (Natural Trout Waters), as defined by the Virginia State Water Control Board Regulations, Water Quality Standards (VR-680-21-00), dated January 1, 1991, or the most recently updated publication. The Virginia Department of Game and Inland Fisheries (VDGIF) designated these same trout streams into six classes. Classes I-IV are considered wild trout streams. Classes V and VI are considered stockable trout streams. Information on designated trout streams can be obtained via their Virginia Fish and Wildlife Information Service's (VAFWIS's) Cold Water Stream Survey database. Basic access to the VAFWIS is available via <http://vafwis.org/wis/asp/default.asp>.

The waters, occurring specifically within the mountains of Virginia, are within the following river basins:

- 1) Potomac-Shenandoah
- 2) James
- 3) Roanoke
- 4) New
- 5) Tennessee and Big Sandy
- 6) Rappahannock

This condition applies to the following counties and cities: Albemarle, Allegheny, Amherst, Augusta, Bath, Bedford, Bland, Botetourt, Bristol, Buchanan, Buena Vista,

Carroll, Clarke, Covington, Craig, Dickenson, Floyd, Franklin, Frederick, Giles, Grayson, Greene, Henry, Highland, Lee, Loudoun, Madison, Montgomery, Nelson, Page, Patrick, Pulaski, Rappahannock, Roanoke City, Roanoke Co., Rockbridge, Rockingham, Russell, Scott, Shenandoah, Smyth, Staunton, Tazewell, Warren, Washington, Waynesboro, Wise, and Wythe.

Any discharge of dredged and/or fill material authorized by the nationwide permits listed above, which would occur in the designated waterways or adjacent wetlands of the specified counties, requires notification to the appropriate Corps of Engineers field office, and written approval from that office prior to performing the work. We recommend that prospective permittees first contact the appropriate field office by telephone to determine if the notification procedures would apply. The notification must be in writing and include the following information (the standard Joint Permit Application may also be used):

- Name, address, and telephone number of the prospective permittee.
- Location of the proposed project.
- Vicinity map and project drawings on 8.5-inch by 11-inch paper (plan view, profile, & cross section).
- Brief description of the proposed project and the project purpose.
- Where required by the terms of the nationwide permit, a delineation of affected special aquatic sites, including wetlands.

When all required information is received by the appropriate field office, the Corps will notify the prospective permittee within 45 days whether the project can proceed under the NWP or whether an individual permit is required. If, after reviewing the notification, the District Engineer determines that the proposed activity would have more than minimal individual or cumulative adverse impacts on the aquatic environment or otherwise may be contrary to the public interest, then he will either condition the nationwide permit authorization to reduce or eliminate the adverse impacts, or notify the prospective permittee that the activity is not authorized by the nationwide permit and provide with instructions on how to seek authorization under an individual permit. If the permittee is not notified otherwise within the 45-day period the permittee may begin the activity.

## **5. Conditions Pertaining to Countersinking of Pipes and Culverts in Nontidal Waters**

This condition applies to: NWPs 3, 7, 12, 14, 17, 18, 21, 23, 25, 27, 29, 32, 33, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 49, and 50.

NOTE: The countersinking requirement does not apply in tidal waters.

- a. Following consultation with the Virginia Department of Game and Inland Fisheries (DGIF), the Norfolk District has determined that fish and other aquatic

organisms are most likely present in any stream being crossed, in the absence of site-specific evidence to the contrary. Although permittees have the option of providing such evidence, extensive efforts to collect such information is not encouraged, since countersinking will in most cases be required except as outlined in the conditions below.

b. All pipes: All pipes and culverts placed in streams will be countersunk at both the inlet and outlet ends, unless indicated otherwise by the Norfolk District on a case-by-case basis (see below). Pipes that are 24" or less in diameter shall be countersunk 3" below the natural stream bottom. Pipes that are greater than 24" in diameter shall be countersunk 6" below the natural stream bottom. The countersinking requirement does not apply to bottomless pipes/culverts or pipe arches. All single pipes or culverts (with bottoms) shall be depressed (countersunk) below the natural streambed at both the inlet and outlet of the structure. In sets of multiple pipes or culverts (with bottoms) at least one pipe or culvert shall be depressed (countersunk) at both the inlet and outlet to convey low flows.

c. Exemption for extensions and certain maintenance: The requirement to countersink does not apply to extensions of existing pipes or culverts that are not countersunk, or to maintenance to pipes/culverts that does not involve replacing the pipe/culvert (such as repairing cracks, adding material to prevent/correct scour, etc.).

d. Floodplain pipes: The requirement to countersink does not apply to pipes or culverts that are being placed above ordinary high water, such as those placed to allow for floodplain flows. The placement of pipes above ordinary high water is not jurisdictional (provided no fill is discharged into wetlands).

e. Hydraulic opening: Pipes should be adequately sized to allow for the passage of ordinary high water *with the countersinking and invert restrictions taken into account*.

f. Pipes on bedrock: Different procedures will be followed for pipes or culverts to be placed on bedrock, depending on whether the work is for replacement of an existing pipe/culvert or a new pipe/culvert:

i. Replacement of an existing pipe/culvert: Countersinking is not required provided the elevations of the inlet and outlet ends of the replacement pipe/culvert are no higher above the stream bottom than those of the existing pipe/culvert. Documentation (photographic or other evidence) must be maintained in the permittee's records showing the bedrock condition and the existing inlet and outlet elevations. That documentation will be available to the Norfolk District upon request, but notification or coordination with the Norfolk District is not otherwise required.

ii. A pipe/culvert is being placed in a new location: If the prospective permittee determines that the bedrock prevents countersinking, they should evaluate the use of a bottomless pipe/culvert, bottomless utility vault, span (bridge) or other bottomless structure to cross the waterway, and also evaluate alternative locations for the new pipe/culvert that will allow for countersinking. If the prospective permittee determines that neither a bottomless structure nor an alternative location is practicable, then they must submit a Pre-Construction Notification to the Norfolk District in accordance with General Condition #27 of the Nationwide Permits. In addition to the information required by General Condition #27, the prospective permittee must provide documentation of measures evaluated to minimize disruption of the movement of aquatic life as well as documentation of the cost, engineering factors, and site conditions that prohibit countersinking the pipe/culvert. Options that must be considered include partial countersinking (such as less than 3" of countersinking, or countersinking of one end of the pipe), and constructing stone step pools, low rock weirs downstream, or other measures to provide for the movement of aquatic organisms. The PCN must also include photographs documenting site conditions. The prospective permittee may find it helpful to contact their regional fishery biologist for the Virginia Department of Game and Inland Fisheries (DGIF), for recommendations about the measures to be taken to allow for fish movements. When seeking advice from DGIF, the prospective permittee should provide the DGIF biologist with all available information such as location, flow rates, stream bottom features, description of proposed pipe(s), slopes, etc. Any recommendations from DGIF should be included in the PCN. The Norfolk District will notify the prospective permittee whether the proposed work qualifies for the nationwide permit within 45 days of receipt of a complete PCN. NOTE: Blasting of stream bottoms through the use of explosives is not acceptable as a means of providing for countersinking of pipes on bedrock.

g. Pipes on steep terrain: Pipes being placed on steep terrain (slope of 5% or greater) must be countersunk in accordance with the conditions above and will in most cases be non-reporting. It is recommended that on slopes greater than 5% the permittee install larger pipe than required for passage of ordinary high water in order to increase the likelihood that natural velocities can be maintained. There may be situations where countersinking both the inlet and outlet may result in a slope in the pipe that results in flow velocities that cause excessive scour at the outlet and/or prohibit some fish movement. This type of situation could occur on the side of a mountain where falls and drop pools occur along a stream. Should this be the case, or should the prospective permittee not want to countersink the pipe/culvert for other reasons, they must submit a Pre-Construction Notification to the Norfolk District in accordance with General Condition #27 of the Nationwide Permits. In addition to the information required by General Condition #27, the prospective permittee must provide documentation of measures evaluated

to minimize disruption of the movement of aquatic life as well as documentation of the cost, engineering factors, and site conditions that prohibit countersinking the pipe/culvert. The prospective permittee should design the pipe to be placed at a slope as steep as stream characteristics allow, countersink the inlet 3-6", and implement measures to minimize any disruption of fish movement. These measures can include constructing a stone step/pool structure, preferably using river rock/native stone rather than riprap, constructing low rock weirs to create a pool or pools, or other structures to allow for fish movements in both directions. Stone structures should be designed with sufficient-sized stone to prevent erosion or washout and should include keying-in as appropriate. These structures should be designed both to allow for fish passage and to minimize scour at the outlet. The quantities of fill discharged below ordinary high water necessary to comply with these requirements (i.e., the cubic yards of stone, riprap or other fill placed below the plane of ordinary high water) must be included in project totals. The prospective permittee may find it helpful to contact their regional fishery biologist for the Virginia Department of Game and Inland Fisheries (DGIF), for recommendations about the measures to be taken to allow for fish movements. When seeking advice from DGIF, the prospective permittee should provide the DGIF biologist with all available information such as location, flow rates, stream bottom features, description of proposed pipe(s), slopes, etc. Any recommendations from DGIF should be included in the PCN. The Norfolk District will notify the prospective permittee whether the proposed work qualifies for the nationwide permit within 45 days of receipt of a complete PCN.

h. Problems encountered during construction: When a pipe/culvert is being replaced, and the design calls for countersinking at both ends of the pipe/culvert, and during construction it is found that the streambed/banks are on bedrock, then the permittee must stop work and contact the Norfolk District (contact by telephone and/or email is acceptable). The permittee must provide the Norfolk District with specific information concerning site conditions and limitations on countersinking. The Norfolk District will work with the permittee to determine an acceptable plan, taking into consideration the information provided by the permittee, but the permittee should recognize that the Norfolk District could determine that the work will not qualify for a nationwide permit.

i. Emergency pipe replacements: In the case of an emergency situation, such as when a pipe/culvert washes out during a flood, a permittee is encouraged to countersink the replacement pipe at the time of replacement, in accordance with the conditions above. However, if conditions or timeframes do not allow for countersinking, then the pipe can be replaced as it was before the washout, but the permittee will have to come back and replace the pipe/culvert and countersink it in accordance with the guidance above. In other words, the replacement of the washed out pipe is viewed as a temporary repair, and a countersunk replacement should be made at the earliest possible date. The Norfolk District must be notified of all pipes/culverts that are replaced without countersinking at the time that it occurs, even if it is an otherwise non-reporting activity, and must provide the

permittee's planned schedule for installing a countersunk replacement (it is acceptable to submit such notification by email). The permittee should anticipate whether bedrock or steep terrain will limit countersinking, and if so, should follow the procedures outlined in (f) and/or (g) above.