



**US Army Corps
of Engineers**
Philadelphia District

Wanamaker Building
100 Penn Square East
Philadelphia, PA 19107-3390
ATTN: CENAP-OP-R

Public Notice

Public Notice No. CENAP-OP-R-2017-0006	Date October 1, 2019
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Application No. Special Public Notice for NWP-NJ Regional Conditions	File No.
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In Reply Refer to:
REGULATORY BRANCH

The purpose of this special public notice is to inform the general public of the proposal to modify the regional conditions currently in effect for nationwide permit activities in the State of New Jersey. In particular, the Corps of Engineers is proposing to rescind regional general conditions G 6(a) which requires the use of non-polluting/alternative materials for all NWP activities in certain waters within the State of New Jersey.

In a *Federal Register* notice (FR Vol 82, No. 4) dated **January 6, 2017**, the U.S. Army Corps of Engineers announced the reissuance of nationwide permits authorizing work in streams, wetlands, and other waters of the United States under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. The 2017 NWPs took effect on **March 19, 2017**. Following the publication of the above mentioned Federal Register notice, the North Atlantic Division (NAD) Commander approved the 2017 NWP regional conditions for the State of New Jersey. Following this approval by the North Atlantic Division Commander, the Philadelphia District issued a special public notice dated **March 30, 2017**, informing the general public of the issuance of the **regional conditions** applicable to NWP activities in the State of New Jersey. Those regional conditions became effective on **March 19, 2017**.

In accordance with 33 CFR 330.5(c), Division engineers are authorized to add regional conditions specific to the needs and/or requirements of a particular region or state. Regional conditions are important mechanisms to ensure that the adverse environmental effects of activities authorized by the NWPs are no more than minimal, both individually and cumulatively. Division engineers may also suspend or revoke specific NWPs in certain geographic areas (e.g., states or watersheds) or high-value aquatic systems where the adverse environmental effects caused by activities authorized by those NWPs may be more than minimal.

The Philadelphia District is the lead district responsible for the development of regional conditions for Nationwide Permit activities in the State of New Jersey. Any decision to rescind this regional condition would be applicable for NWP activities in both the Philadelphia District and New York District portions of New Jersey. It should be further noted that on March 2, 1994, the State of New Jersey assumed the permitting responsibilities within the State pursuant to Section 404 of the Clean Water Act. As such, the NWP actions are restricted to those portions of the State that remain under Federal regulatory jurisdiction.

As a part of the administrative process to develop and approve NWP regional conditions pursuant to 33 CFR 330.5, the Philadelphia District coordinated/consulted with all appropriate federal, state, and local agencies, including Tribes. Specifically, the Corps is required to coordinate with the National Marine Fisheries Service (NMFS) pursuant to the Magnuson-Stevens Fishery Conservation and Management Act in accordance with its implementing regulations for essential fish habitat (EFH) found at 50 CFR 600.905.

Currently, NWP EFH Regional General Condition, **G-6(a)** reads as follows:

Condition G-6(a): For ALL NWP activities proposing the construction and/or replacement of structures in areas mapped as shellfish habitat as defined in the New Jersey Department of Environmental Protection, *N.J.A.C. 7:7-9.2, Coastal Zone Management Rules, as amended on June 20, 2016* and/or last amended, the following conditions shall be met:

- (1) All structures, including piers and docks (piles, stringers, whalers and decking), utility poles, boat lifts, mooring piles, breakwaters, and replacement bulkheads must be constructed with non-polluting material, such as plastic, natural cedar or other untreated wood, polymer coated pressure-treated wood, concrete or other inert products. Examples of commonly used treated materials are; creosote, pressure-treated lumber, (i.e. preservative treatment such as CCA-C, ACZA, CC, ACQ, etc.) (wolmanized) which is susceptible to leaching are considered polluting materials and are not acceptable for the purpose of this permit unless a polymer coating is applied to the material prior to installation;
- (2) Those shellfish areas mapped by the NJDEP as “condemned” and/or “prohibited” for the purpose of harvesting shellfish, shall continue to be considered shellfish habitat for the purposes of Nationwide Permit Verification.

After further consideration and review of all available information, this office has determined that this regional condition continues to generate uncertainty with regard to the specific types of materials required as well as the locations where these materials are required. In addition, the Corps believes that there is insufficient justification for this regional condition based upon the expressed concerns for essential fish habitat and is no longer appropriate. As such, the Corps is proposing to rescind this regional condition.

It is further noted that the New Jersey Department of Environmental Protection (NJDEP) requires the use of these non-polluting/alternative materials in certain waters of the State of New Jersey pursuant to their Coastal Zone Management (CZM) program. However, there are differences in those waters where the Federal and State conditions are applicable. While the Corps believes that these non-polluting/alternative materials are not justified pursuant to the essential fish habitat regulations, any CZM conditions required by the state of New Jersey through issuance of a waterfront development permit, coastal wetland permit, water quality certificate, or Zane exemption/waiver would become conditions of any related Federal authorization by reference. As a further note, consistent with Assembly Bill, No. 2804, P.L. 2007, CHAPTER 113, the use of creosote treated material is prohibited within the State of New Jersey and all NJDEP, Land Use Regulation permits are conditioned to prohibit its use. This proposed action will not affect this prohibition by the State of New Jersey. We believe that the removal of NWP regional condition G-6(a) will result in greater clarity for the public with respect to activities in New Jersey where the use of non-polluting materials is required.

In response to the 2017 NWP re-authorization process, the State of New Jersey denied CZM consistency and Section 401 WQC, where applicable, for all NWP activities within the State of New Jersey with the exception of NWPs 1, 24, 30, 37, and 48. With the exception of NWPs 1, 24, 30, 37, and 48, any applicant proposing to conduct work in federally regulated waters, including wetlands, within the State of New Jersey must obtain a project specific CZM and WQC approval or waiver from NJDEP prior to conducting the proposed work. This approval must be obtained in order for the activity to be authorized under an NWP. Any project specific conditions required by the State for the WQC and/or CZM approval will automatically become part of the NWP authorization. Any comments concerning the impact of this proposed action on the State's coastal zone should be sent to this office, with a copy to the New Jersey Department of Environmental Protection, Land Use Regulation Program, P.O. Box 439, Trenton, New Jersey, 08625.

As noted above, the Magnuson-Stevens Fishery Conservation and Management Act requires all federal agencies to consult with the NOAA Fisheries all actions, or proposed actions, permitted, funded, or undertaken by the agency that may adversely affect Essential Fish Habitat (EFH). The Philadelphia District will evaluate the potential effects of this proposed modification of the NWP regional conditions on EFH and will prepare an EFH assessment for review and coordination with NOAA Fisheries. This coordination will be concluded prior to the final decision on this proposed modification.

No activity is authorized by any nationwide permit which is likely to jeopardize the continued existence of a threatened or endangered species as listed or proposed for listing under the Federal Endangered Species Act (ESA), or to destroy or adversely modify the critical habitat of such species. A consultation was previously completed by the Corps with the U.S. Fish and Wildlife Service and National Marine Fisheries Service. The Corps of Engineers has determined that this proposed modification of the NWP regional condition will not alter that previous consultation. Accordingly, our previous determination with respect to the Endangered Species Act remains unchanged and no additional consultation is considered necessary pursuant to the Endangered Species Act.

The Corps of Engineers is soliciting comments from the public; Federal, state and local agencies and officials; Indian Tribes; and other interested parties in order to consider and evaluate the impacts of the proposed revocation of NWP regional general condition G-6(a) from the 2017 NWP regional conditions for the State of New Jersey. Any comments received will be considered by the U.S. Army Corps of Engineers to determine whether or not to rescind this regional condition.

The decision whether to rescind this NWP regional condition will be based on an evaluation of the probable impact including its cumulative impacts with specific consideration for species regulated under the Magnuson Stevens Act. The decision will reflect the national concern for both protection and utilization of important resources. The benefits, which reasonably may be expected to accrue from this proposed action must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to this regional condition will be considered. If it is determined that this NWP regional condition is no longer appropriate and necessary.

Any person may request, in writing, to the District Engineer, within the comment period specified in this notice, that a public hearing be held to consider this general permit modification. Requests for a public hearing shall state in writing, with particularity, the reasons for holding a public hearing.

Comments on the proposed revocation of NWP regional general condition **G-6(a)** within the State of New Jersey should be submitted, in writing, within **30** days to the District Engineer, U.S. Army Corps of Engineers, Wanamaker Building, 100 Penn Square East, Philadelphia, Pennsylvania 19107-3390. Additional information concerning this proposed action can be obtained by contacting Mr. Bryan Bellacima of this office at 215-656-6732 or by writing to the above address.

FOR THE DISTRICT ENGINEER:

Edward E. Bonner
Chief, Regulatory Branch