

## Regulatory Guidance Letter 92-04

### SUBJECT: Section 401 Water Quality Certification and Coastal Zone Management Act Conditions for Nationwide Permits

DATE: September 1992      EXPIRES: January 21, 1997

1. The purpose of this Regulatory Guidance Letter (RGL) is to provide additional guidance and clarification for divisions and districts involved in developing acceptable conditions under the Section 401 Quality Certifications and Coastal Zone Management Act (CZM) concurrences for the Nationwide Permit (NWP) Program. This RGL represents a clarification of 330.4(c) (2) and (3) and 330.4(d) (2) and (3), concerning when NWP Section 401 and CZM conditions should not be accepted and thus treated as a denial without prejudice. The principles contained in this RGL also apply to 401 certification and CZM concurrence conditions associated with individual permits and regional general permits.

2. Corps divisions and districts should work closely and cooperatively with the States to develop reasonable 401 and CZM conditions. All involved parties should participate in achieving the purpose of the NWP program, which is to provide the public with an expeditious permitting process while, at the same time, safeguarding the environment by only authorizing activities which result in no more than minimal individual and cumulative adverse effects. When a State certifying agency or CZM agency proposes conditions, the division engineer is responsible for determining whether 401 Water Quality Certification or CZM concurrence conditions are acceptable and comply with the provisions of 33 CFR 325.4. In most cases it is expected that the conditions will be acceptable and the division engineer shall recognize these conditions as regional conditions of the NWP's.

3. Unacceptable Conditions: There will be cases when certain conditions will clearly be unacceptable and those conditioned 401 certifications or CZM concurrences shall be considered administratively denied. Consequently, authorization for an activity which meets the terms and conditions for such NWP(s) is denied without prejudice.

a. Illegal conditions are clearly unacceptable. Illegal conditions would result in violation of a law or regulation, or would require an illegal action. For example, a condition which would require an applicant to obtain a 401 certification or CZM concurrence, where the State has previously denied certification or concurrence, prior to submitting a pre-discharge notification (PDN) to the Corps in accordance with PDN procedures, would violate the Corps regulation at 33 CFR 330.4(c) (6). Another example would be a case where an applicant would be required, through a condition, to apply for an individual Department of the Army permit. Another example is a requirement by the State agency to utilize the 1989 Federal Wetland Delineation Manual to establish jurisdiction.

b. As a general rule, a condition that would require the Corps or another Federal agency to take an action which we would not otherwise take and do not choose to take, would be

clearly unacceptable. For example, where the certification or concurrence is conditioned to require a PDN, where the proposed activity did not previously require a PDN, the Corps should not accept that condition, since implicitly the Corps would have to accept and utilize the PDN. Another example would be a situation where the U.S. Fish and Wildlife Service is required, through a condition, to provide any type of formal review or approval.

c. Section 401 or CZM conditions which provide for limits (quantities, dimensions, etc.) different from those imposed by the NWP do not change the NWP limits.

1. Higher limits are clearly not acceptable. For example, increasing NWP 18 for minor discharges from 10 to 50 cubic yards would not be acceptable. Such conditions would confuse the regulated public and could contribute to violations.

2. Lower limits are acceptable but have the effect of denial without prejudice of those activities that are higher than the Section 401 or CZM condition limit but within the NWP limit. Thus, if an applicant obtains an individual 401 water quality certification and/or CZM concurrence for work within the limits of an NWP where the State had denied certification and/or CZM concurrence, then the activity could be authorized by the NWP.

d. A condition which would delete, modify, or reduce NWP conditions would be clearly unacceptable.

4. Discretionary Enforcement: The institution of enforcement actions by the Corps, whether directed at unauthorized activities or to ensure compliance with permit conditions, is discretionary. The district engineer will consider the following situations when determining whether to enforce 401 and/or CZM conditions.

- a. Unenforceable Conditions - Some conditions that a State may propose will not be reasonably enforceable by the Corps (e.g., a condition requiring compliance with the specific terms of another State permit). Provided such conditions do not violate paragraph 3 above, the conditions will be accepted by the Corps as regional conditions. However, limited Corps resources should not be utilized in an attempt to enforce compliance with 401 or CZM conditions which the district engineer believes to be essentially unenforceable, or of low enforcement priority for limited Corps resources.

- b. Enforceable Conditions - Some other conditions proposed by a State may be considered enforceable, (e.g., a condition requiring the applicant to obtain another State permit), but of low priority for Federal enforcement, since the Federal Government would not have required those conditions but for the State's requirement. Furthermore, the Corps will generally not enforce such State-imposed conditions and except in very unusual cases, due to our limited personnel and financial resources.

5. NWP Verification and PDN Responses: In response to NWP verification requests and PDN's, district engineers should utilize the sample paragraphs presented below. This

language should be used where conditional 401 certification or CZM concurrence has been issued. This specifically addresses situations when the conditions included with the certification or concurrence are such that the district engineer cannot clearly determine compliance with the 401/CZM conditions (see 4.a.).

"Based on our review of your proposal to (describe proposal), we have determined that the activity qualifies for the nationwide permit authorization [insert NWP No(s).], subject to the terms and conditions of the permit. [Insert paragraph on any Corps require activity-specific conditions.]

Enclosed you will find a copy of the Section 401 Water Quality Certification and/or Coastal Zone Management special conditions, which are conditions of your authorization under Nationwide Permit [insert NWP No(s)]. If you have questions concerning compliance with the conditions of the 401 certification or Coastal Zone Management concurrence, you should contact the [insert appropriate State agency]. If you do not or cannot comply with these State Section 401 certification conditions and/or CZM conditions, then in order to be authorized by this Nationwide Permit, you must furnish this office with an individual 401 certification or Coastal Zone Management concurrence from [insert "60 days" for Section 401 water quality certification, unless another reasonable period of time has been determined pursuant to 33 CFR 330.4(c) (6), or insert "six months" for CZM concurrence] after you submit it to the State agency."

6. This guidance expires 21 January 1997 unless sooner revised or rescinded.

FOR THE DIRECTOR OF CIVIL WORKS

John P. Elmore, P.E.  
Chief, Operations, Construction Readiness Division  
Directorate of Civil Works