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June 13, 2011

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Re: Regional General Permits for Shellfish Aquaculture (MASGC 11-008-04)

This product was prepared by the Mississippi-Alabama Sea Grant Legal Program under award number NA10OAR4170078 from the National Oceanic and Atmospheric Administration, U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the author and do not necessarily reflect the views of NOAA or the U.S. Department of Commerce.

Dear Bill,

As requested during our meeting on March 17, 2011, the Mississippi-Alabama Sea Grant Legal Program has been conducting research on some of the legal issues raised by your novel proposal to establish an oyster aquaculture "farming park" in Alabama. This memo, which is the third in a series, discusses the development of a regional general permit for oyster aquaculture. The following research is provided for informational purposes only and does not constitute legal representation of the Auburn University Shellfish Laboratory or its constituents.

The Clean Water Act prohibits the "discharge of dredged or fill material" into the navigable waters of the U.S. without a permit from the U.S. Army Corps of Engineers.¹ The placement of shellfish seed and/or suitable substrate used to increase shellfish production is considered a discharge of fill material; oyster growers must therefore obtain a §404 permit before commencing operations. In addition, Section 10 of the Rivers and Harbors Act requires authorization from the Corps for the "creation of any obstruction ... to the navigable capacity" of U.S. waters.² Since off-bottom oyster culture involves the placement of structures from which to suspend the oyster gear and such structures could obstruct navigation in the area, oyster growers utilizing such a system would also need to obtain a Section 10 permit. As the Corps uses the same administrative procedures for both permitting programs, in situations where both permits are required, the

¹ 33 U.S.C. § 1344(a).

² *Id.* § 403.

Corps usually issues a joint permit. The remainder of this memo will focus, however, on the Section 404 program.

Type of Section 404 Permits

Under the CWA, the Corps can issue two types of permits: individual permits and general permits.

- *Individual permits* are issued to each applicant on a case-by-case basis following an intensive agency review. After receiving an individual permit application, the Corps issues a public notice describing the proposed activity, its location, and any potential for environmental impacts. The notice is followed by a public comment period during which members of the public and any interested local, state, or federal entities have an opportunity to comment on the proposed activity. The Corps conducts a "public interest review" for each permit application, evaluating the "probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest."³ Projects must also comply with the Environmental Protection Agency's Section 404(b)(1) Guidelines, which are designed to ensure that projects do not have an "unacceptably adverse impact" on the environment.⁴ If the proposed discharge complies with the Section 404(b)(1) Guidelines, the Corps will issue the permit unless the issuance "would be contrary to the public interest."⁵
- *General permits*, on the other hand, are issued for a particular category of activities on a state, regional, or nationwide basis. The Corps, following a public notice and comment period, may issue general permits for any category of activities involving the discharge of dredged or fill material into waters of the U.S. if the activities are "[1] similar in nature; [2] will cause only minimal adverse environmental effects when performed separately; and [3] will have only minimal cumulative adverse effect on the environment."⁶ General permits must also comply with Section 404(b)(1) guidelines. General permits can be issued for five-year periods. Activities authorized by a general permit may proceed with little or no paperwork provided that the general or specific conditions of the general permit are met, although some general permits require the permittee to notify the Corps before taking action.⁷

Not surprisingly, applicants prefer to proceed pursuant to general permits, as they eliminate the need for individual review, thus allowing applicants to obtain the Section 404 permit more quickly and at a lower cost. For individual permit applicants, it usually takes between two to six months for an applicant to receive a decision; however, with general permits, applicants usually receive authorization within 30 days.⁸ It should be noted, however, that qualification for a

³ 33 C.F.R. §320.4(a)(1).

⁴ See, *id.* § 230.1(c).

⁵ *Id.* § 323.6(a).

⁶ 33 U.S.C. § 1344(e). Further, general permits must comply with Section 404(b)(1) guidelines and "set forth the requirements and standards which shall apply to any activity authorized by such general permit." *Id.* Once issued, general permits can be valid for up to five years.

⁷ See 33 C.F.R. §330.1.

⁸ See, EPA, Overview of EPA Authorities for Natural Resource Managers Developing Aquatic Invasive Species Rapid Response and Management Plans: CWA Section 404-Permits to Discharge Dredged or Fill Material, <http://water.epa.gov/type/oceb/habitat/cwa404.cfm> .

Section 404 general permit does not relieve the applicant of additional permitting requirements under other federal or state laws. It simply streamlines the process for the dredge and fill permit.

The State's Role

Under Section 401 of the Clean Water Act⁹ and Section 307(c)(1) of the Coastal Zone Management Act,¹⁰ states have the authority to review federal permit applications to determine whether the activity complies with state water quality standards and is consistent with the state's coastal management program, respectively. Federal agencies may not issue permits until these certifications are obtained. States may either grant the certification, with or without conditions, or deny the certification (thereby effectively vetoing the project). Both individual and general permits are subject to these certification processes.

NWP 48 (Ongoing Commercial Shellfish Operations)

Ongoing commercial shellfish operations requiring Section 404 permits may be authorized under a nationwide permit, NWP 48, issued by the Corps on March 12, 2007 and effective until March 18, 2012. NWP 48 authorizes

the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures necessary for the continued operation of the existing commercial aquaculture activity. This NWP also authorizes discharges of dredged or fill material necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. Rafts and other floating structures must be securely anchored and clearly marked.

This NWP does not authorize new operations or the expansion of the project area for an existing commercial shellfish aquaculture activity. This NWP does not authorize the cultivation of new species (i.e., species not previously cultivated in the waterbody). This NWP does not authorize attendant features such as docks, piers, boat ramps, stockpiles, staging areas, or the deposition of shell material back into waters of the United States as waste.¹¹

Unless the existing project area was greater than 100 acres, all existing commercial shellfish operators had to do was submit a report to the Corps, within 90 days of the effective date of the NWP (March 12, 2007) which included the following information:

- 1) The size of the project area for the commercial shellfish aquaculture activity (in acres;
- 2) The location of the activity;
- 3) A brief description of the culture method and harvesting method(s);
- 4) The name(s) of the cultivated species; and
- 5) Whether canopy predator nets are being used.

As long as there were no changes to the operation that would require pre-construction notification, only one report needed to be submitted during the five-year period. Under NWP 48, permittees are required to submit a pre-construction notification to the Corps if:

⁹ 33 U.S.C. § 1341.

¹⁰ 16 U.S.C. § 1456.

¹¹ U.S. Army Corps of Engineers, Reissuance of Nationwide Permits, 72 Fed. Reg. 11,092,11,190-91 (Mar. 12, 2007).

- 1) The project area is greater than 100 acres; or
- 2) There is any reconfiguration of the aquaculture activity, such as relocating existing operations into portions of the project area not previously used for aquaculture activities; or
- 3) There is a change in species being cultivated; or
- 4) There is a change in culture methods (e.g., from bottom culture to off-bottom culture); or
- 5) Dredge harvesting, tilling, or harrowing is conducted in areas inhabited by submerged aquatic vegetation.¹²

When pre-construction notification (PCN) is required, the prospective permittee may not commence the proposed operations until receiving written notification from the Corps that the activity may proceed under the NWP. Such notification is given upon a determination by the Corps that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal.¹³ If following the receipt of the PCN the Corps determines that the adverse effects of the proposed work are more than minimal, the applicant will be notified that either

- 1) The project does not qualify for authorization under the NWP and that the applicant may seek authorization under an individual permit;
- 2) The project is authorized under the NWP subject to the submission of a mitigation plan that would reduce the adverse effects on the aquatic environment; or
- 3) The project is authorized under the NWP with specific modifications or conditions.¹⁴

On June 19, 2007, the Corps' Mobile District issued Special Public Notice No. SAM-2006-2139-JBE announcing the State of Alabama's regional conditions, water quality certification, and coastal zone management program consistency determination with respect to the Corps' 2007 Nationwide Permit Program.¹⁵ The Alabama Department of Environmental Management (ADEM) issued water quality certifications, with conditions, for all the NWPs, but found NWP 48 to be inconsistent with the Alabama Coastal Management Program. As a result of this inconsistency finding, ADEM declared that NWP 48 was "not authorized for use within the coastal area of Alabama." Such a finding does not necessarily mean that existing commercial shellfish operations in Alabama cannot take advantage of NWP 48; rather NWP authorization is likely "contingent upon obtaining the necessary [project-specific] CZMA consistency concurrence from the State."¹⁶ In other words, a potential permittee would need to file a project-specific consistency determination with ADEM prior to commencing operations. If ADEM concurred in that determination, the permittee could then proceed under NWP 48. If ADEM found that project to be inconsistent with the Alabama coastal management program, the project could not be permitted by the Corps. The permittee's only recourse at that point would be an administrative appeal to the Secretary of Commerce.

¹² *Id.* at 11,191.

¹³ *Id.* at 11,196.

¹⁴ *Id.*

¹⁵ Available at <http://www.sam.usace.army.mil/RD/reg/2007%20NWP%20Certification-Alabama.pdf>.

¹⁶ U.S. Army Corps of Engineers, Proposal to Reissue and Modify Nationwide Permits, 76 Fed. Reg. 9174, 9178 (Feb. 16, 2011); *see also*, 33 C.F.R. § 330.4(d).

Because of the time-consuming and expensive nature of the individual permitting process, pressure is mounting to include all shellfish operations, existing, expanding, and new, in the Nationwide Permit Program. On February 16, 2011, the Corps released its proposal regarding the reissuance of the current NWP's which expire on March 18, 2012. The Corps is proposing to modify NWP 48 to authorize work "necessary for the continued operation and/or expansion of existing commercial shellfish operations, including the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures."¹⁷ The modified NWP 48, however, would not authorize

- (a) The cultivation of species not previously cultivated in the waterbody or of an aquatic nuisance species as defined in the Non-Indigenous Aquatic Nuisance Prevention and Control Act of 1990; or,
- (b) Attendant features such as docks, piers, boat ramps, stockpiles, staging areas, or the deposition of shell material back into waters of the United States as waste.¹⁸

Neither would NWP 48, as proposed, authorize new commercial shellfish operations. But, in its proposal, the Corps solicited "comments on modifying NWP 48 to authorize new commercial shellfish aquaculture activities, or alternatively, issuing a new NWP to authorize those activities."¹⁹ The public comment period for this proposal closed on April 18, 2011. The Corps' solicitation of comments on this issue is a promising development, although it is impossible to predict how the Corps will eventually proceed. It is important that the Alabama shellfish industry stay informed regarding the reissuance of NWP 48, as significant changes are under consideration.

Regional General Permits (New Commercial Shellfish Operations)

Virginia

The exclusion of new and expanded commercial shellfish operations from the Nationwide Permit Program has led some Corps districts to develop regional general permits for shellfish operations. Regional permits are a type of general permit that may be issued by a Division or District Engineer through a process similar to the issuance of a nationwide permit.²⁰ Although Section 404 of the Clean Water Act refers to state, regional, and nationwide permits, the term "region" is not defined and most "regional general permits" only cover activities within a portion of one state's waters.

In 1993, the Virginia Marine Resources Commission worked in tandem with the Corps to develop a regional general permit for oyster aquaculture.²¹ The Norfolk District of the U.S. Corps of

¹⁷ 76 Fed. Reg. at 9199.

¹⁸ *Id.*

¹⁹ *Id.* at 9183.

²⁰ 33 C.F.R. § 325.5(c)(1).

²¹ Rona Kobell, *Regional Permit Streamlines Application Process for VA Oyster Growers*, CHESAPEAKE BAY JOURNAL (Dec. 2010), <http://www.bayjournal.com/article.cfm?article=3980>; Rona Kobell, *Would-be MD Oyster Farmers Drowning in Permit Paperwork*, CHESAPEAKE BAY JOURNAL (Jan. 2011), <http://www.bayjournal.com/article.cfm?article=4009>

Engineers issued the current version of Regional Permit 19 (08-RP-19) on August 14, 2008.²² Like nationwide permits, regional general permits are issued for five-year terms; Regional Permit 19 therefore expires on August 14, 2013.

Regional Permit 19 actually covers a broad range of activities requiring a Section 404 fill permit. Section 12 details the requirements for aquaculture and mariculture activities.

12. Aquaculture/Mariculture Activities:

- a. This authorization is limited to the bottom and suspended culturing and harvesting of bivalve mollusks in the intertidal and subaqueous areas of navigable waters. Activities covered include: deployment and maintenance of buoys, rafts, trays, and other equipment associated with the activity, and work including temporary wet storage, and harvesting.
- b. The aquaculture activity area and any elevated structures within the area shall be marked as prescribed by the United States Coast Guard in accordance with 33 CFR 64. The permittee must contact the United States Coast Guard, Aids to Navigation Branch at (757) 398-6230 to ascertain the proper markings for the activity. Aids to navigation shall be deployed and maintained as appropriate.
- c. No aquaculture activity shall occur within beds of submerged aquatic vegetation or saltmarsh, nor shall such vegetation be damaged or removed. Should an area become colonized by submerged aquatic vegetation or saltmarsh after an authorized aquaculture activity is installed, the activity shall be allowed to remain, however, no expansion into newly colonized areas is authorized by this regional permit. Information on the location of submerged aquatic vegetation can be obtained from the Norfolk District Corps of Engineers (at telephone (757) 201-7652) and from the Virginia Institute of Marine Science (at telephone (804) 642-7332).
- d. An aquaculture activity will not meet the terms for this RP if it will have more than minimal adverse effects on avian resources such as, but not limited to: shore birds, wading birds, or members of the waterfowl group. This includes nesting, feeding or resting activities by migratory birds identified at 50 CFR 10.13.
- e. An aquaculture activity will not qualify for this RP if it will have more than minimal adverse effects on existing or naturally occurring beds or population of shellfish, marine worms or other invertebrates that could be used by man, other mammals, birds, reptiles, or predatory fish.
- f. No aquaculture activity or vehicular access to the activity shall occur in such a way as to negatively impact coastal or wetland vegetation.
- g. Special Conditions for Structures in Section VII below apply to this activity as well as the general conditions listed in the regional permit.

Regional Permit 19 also allows for a joint permit application, which streamlined the permitting process.²³ Prior to commencing work authorized by Regional Permit 19, the applicant is required to obtain the necessary approvals from the Virginia Marine Resources Commission and/or the

²² A copy of Regional Permit 19 is available at http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/08-RP_LOP_Final/08-RP-19.pdf.

²³ *Id.*

local wetland board.²⁴ To start the permitting process, an individual hoping to start a new shellfish operation in Virginia would submit a "Tidewater Joint Permit Application" form to the Virginia Marine Resources Commission.²⁵ The VMRC forwards the application to the Corps and other regulatory agencies involved in the permitting process. The Corps will approve the permit if all of the conditions outlined above are met.

Maryland

Regional Permit 19 only authorizes activities "undertaken within the geographical limits of the Commonwealth of Virginia under the regulatory jurisdiction of the Norfolk District."²⁶ Shellfish farmers in the Maryland portion of the Chesapeake Bay, which falls under the regulatory jurisdiction of the Baltimore District, still have to undergo the lengthy individual permitting process, unless they were an existing operation in 2007 and qualified for NWP 48.²⁷ The Baltimore District and the Maryland Department of Natural Resources (DNR), however, do have a joint permitting process for Commercial Shellfish Aquaculture submerged land leases in the Chesapeake Bay, its tributaries and the Coastal Bays.²⁸ Applications are submitted to the DNR, which forwards it to the Corps for federal review.

Maryland has been working for several years to amend state laws to facilitate the growth of its aquaculture industry and, on February 14, 2011, the Baltimore District, proposed a new regional general permit (RGP-1) for the Maryland portion of the Chesapeake Bay that would authorize new commercial, research, and educational bivalve shell fish aquaculture activities.²⁹ The proposed RGP-1 would authorize the following activities:

1. The discharge of dredged or fill material necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities for new commercial, research, and educational bivalve shellfish aquaculture activities.
2. The installation, operation, and maintenance of buoys, floats, racks, trays, bags, nets, other temporary protective enclosures, lines, tubes, containers, anchors, stakes, and other structures necessary for new commercial, research, and educational bivalve shellfish aquaculture activities, including temporary wet storage and harvesting.
3. The expansion of a previously authorized project area for an existing commercial, research, and educational bivalve shellfish aquaculture operation.³⁰

The comment period for RGP-1 closed on March 15, 2011.

²⁴ See, Regional Permit 19, § III.

²⁵ A copy of the Tidewater Joint Permit Application is available at <http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/WebTidewaterJPA2008.pdf>.

²⁶ RP 19, *supra* note 22, at § VIII(1).

²⁷ *Id.*

²⁸ See, U.S. Army Corps of Engineers, Baltimore District, Aquaculture in Maryland, <http://www.nab.usace.army.mil/Wetlands%20Permits/aquaculture.htm>.

²⁹ *Id.*

³⁰ U.S. Army Corps of Engineers, Baltimore District, Special Public Notice #11-12 (Feb. 14, 2011), available at <http://www.nab.usace.army.mil/Regulatory/PublicNotice/SPN/spn11-12.pdf>.

Transferability of RGP Model to Alabama

In theory, the Mobile District of the U.S. Army Corps of Engineers could develop and issue a regional general permit for shellfish aquaculture for Mobile Bay. From a practical standpoint, however, obtaining a regional general permit in Alabama could be quite difficult. Unlike in Virginia and Maryland, Alabama does not have a joint application process for Section 404 permits and state submerged land leases. Applications for Section 404 permits are submitted directly to the Corps, which notifies the Alabama Department of Environmental Management (ADEM) when a water quality certification is required. If the shellfish aquaculture project would require the leasing of state submerged lands, leases would need to be obtained from a third agency – the Alabama Department of Conservation and Natural Resources (DCNR).

Before a regional general permit like the one in effect in Virginia and under consideration in Maryland could be issued for Mobile Bay, the three primary regulatory agencies (Mobile District, ADEM, and DCNR) would need to agree on a more streamlined process. There is precedent within the Mobile District for a joint permit application, as the Mississippi Department of Marine Resources (DMR) accepts applications for Section 404 permits in coastal wetlands pursuant to a memorandum of understanding with the Mobile District and the Mississippi Department of Environmental Quality (MDEQ).³¹

If a similar MOU was negotiated in Alabama and a regional general permit issued by the Corps, DCNR could be authorized to accept joint applications for shellfish aquaculture in Mobile Bay. The joint application could be designed to collect information necessary for Section 404 permits and state submerged land leases. Each agency would retain their traditional authorities and remain responsible for issuing their respective permits and/or certifications, but the process would be streamlined through DCNR. Such a significant reorganization of the permitting process in Alabama would be a major undertaking and could be quite contentious.

I hope you have found this information helpful. Please let me know if you have follow-up questions or concerns.

Sincerely,



Stephanie Showalter Otts

Director, Mississippi-Alabama Sea Grant Legal Program

³¹ See, Mississippi Department of Marine Resources, Wetlands Permitting, http://www.dmr.state.ms.us/Coastal-Ecology/permitting/mississippi_coastal_zone_wetland.htm. MDEQ administers the state's Water Quality Certification program.