

# Local Conditions Severely Limit Power of General Permit for Commercial Shellfish Aquaculture

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## Introduction

The U.S. Army Corps of Engineers (Corps) issues Nationwide Permits (NWP) in order to encourage certain activities. Authority for the Corps' NWP comes from Section 404(e) of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act. The Corps has issued NWPs since 1977 and redrafts them every five years, with input from the public and other government agencies. Most recently in 2017, the Corps reissued fifty and published two new NWPs, including an amended version of NWP 48: Commercial Shellfish Aquaculture Activities.

General permits like NWP 48 expedite the permitting process for activities that have only minimal adverse environmental effects and encourage the growth of these activities. In contrast, projects that do not meet the requirements for a general permit must seek approval through the more detailed and time-consuming individual permit process. The Corps amended NWP 48 in 2017 to serve this goal and “reduce the number of [aquaculture] activities that require individual review by Corps districts.” Even with an intentionally streamlined NWP available, however, not all commercial shellfish aquaculture operations can take advantage of those benefits. One reason for this may be the local conditions added by states or district Corps offices.

## History of Nationwide Permit 48

Nationwide Permits can be in effect for up to five years, so the Corps must go through a reissuance process every half decade. The process begins with the Corps posting a proposed rule in the *Federal Register* and allowing a period for public comment, during which members of the public may submit notice of concern or support for new, old, or amended NWPs. In the most recent reissuance, the Corps received and considered more than 54,000 comments submitted over the sixty-day period.

Next, the Corps drafts a final rule and submits it to other government agencies. The Corps then publishes the final version of the permits in the *Federal Register*, and each of the

Corps' district offices has the opportunity to issue district-specific conditions to the permit. Districts may also fully deny approval of a NWP, thereby fully preventing its implementation in favor of local rules. States, like districts, also have limiting authority. For example, in the final stage of NWP reissuance, the Coastal Zone Management Act (CZMA) requires that states determine whether the general permits are consistent with their federally approved coastal management programs.<sup>3</sup> A state may give full concurrence, meaning it determines the permits are fully consistent with state program requirements, or it may determine that additional requirements are necessary in order for general permit activities to be consistent with state environmental standards. States may also fully deny federal consistency, meaning that the federal agency in question is prohibited from issuing permits authorized under the NWP in question in that state. States also have authority to condition NWPs through the Water Quality Certification review process under the Clean Water Act.

The Corps first issued NWP 48 in 2007 and has reissued it with amendments in 2012 and 2017. Its title, “Commercial Shellfish Aquaculture Activities,” refers to activities such as seeding, cultivating, and harvesting aquatic invertebrates like clams, oysters, and mussels. This process often involves a physical infrastructure of cages, nets, or floating buoys to hold the growing animals, and harvesting sometimes involves dredging the animals. Shellfish farming operations near the coastline are under the jurisdiction of the Corps, even when the waters are above state-owned lands. This is because the aquaculture activities have the potential to interfere with navigation, which is under the Corps' authority.

After several amendments, NWP 48 now serves to authorize both new (meaning it is the first operation in the area in the past 100 years) and existing commercial shellfish aquaculture operations. Approved activities include the installation of buoys, floats, trays, nets, containers, etc., into navigable U.S. waters and the discharge of dredged or fill material into those waters as necessary for the “seeding, rearing, cultivating, transplanting, and harvesting” of shellfish.<sup>4</sup>

NWP 48 specifically does not authorize cultivation of nonindigenous species (unless previously cultivated in that water body), cultivation of an aquatic nuisance species,<sup>5</sup> other attendant features like docks, piers, or boat ramps, deposition of waste shell material back into United States waters, or activities directly affecting more than one half acre of submerged aquatic vegetation beds, unless the project area has been used for commercial shellfish aquaculture in the past 100 years.

### General Conditions and Preconstruction Notification

Along with the reissuance of NWPs, the Corps includes a list of requirements that apply to all of the general permits. These thirty-two requirements are called General Conditions and must be followed in addition to any requirements in the language of specific permits.

Some of the General Conditions are very specific as to what they require of a permittee. For instance, condition number sixteen regarding Wild and Scenic Rivers and condition number eighteen regarding endangered species are long and contain references to acts of Congress and resources from other federal agencies giving definitive requirements for compliance. Other general conditions have ambiguous stipulations. As an example, condition number four requires that permittees avoid activity in spawning areas “to the maximum extent practicable.” Five other conditions use this phrase as well.

General Condition number thirty-two, outlining how and when to submit pre-construction notification (PCN) to a district engineer, is perhaps the most referenced condition by the Corps’ District Offices and state agencies. PCN is a document submitted by an applicant to describe the scope and duration of a project, and it serves to give the Corps additional time and information to consider the impact of a project. Regional requirements commonly add circumstances under which permittees must submit PCN, and some NWP’s list specific circumstances requiring PCN as well. For NWP 48, applicants for a permit must submit PCN if the aquaculture activity involves a species not previously cultivated in the particular water body, or when the proposed activity is in a project area that has not been used for commercial shellfish aquaculture in the past 100 years (a “new” operation).

### Several Approaches to State Conditions

Mississippi, Alabama, Louisiana, and Florida each took different approaches to shellfish aquaculture under NWP 48.

### Mississippi

The Mississippi Department of Marine Resources (MDMR) holds the responsibility to determine CZMA consistency with the Mississippi Coastal Program. For the 2017 NWP reissuance, MDMR prescribed just one additional condition that applies to applicants in three categories of water, relevant to the state’s coastal counties.<sup>6</sup> These include: (1) tidal waters in the three coastal counties: Jackson, Harrison, and Hancock; (2) all U.S. waters with a “surface hydrological connection” to tidal waters that are within 200 feet of the mean high tide mark; and (3) all marsh habitats, whether saltwater, brackish, or freshwater, with a surface hydrological connection to tidal waters whether or not it is located within 200 feet of the mean high tide mark. For activities occurring in any of these three categories, MDMR effectively denied concurrence by adding one condition; permit applicants must submit their plans to MDMR for CZMA consistency approval on a project-specific basis. If MDMR declines to grant consistency after its CZMA review, a project is prohibited from operating in listed waters in Mississippi, even if it would otherwise qualify for authorization under a general permit such as NWP 48.

### Alabama

The Alabama Department of Environmental Management (ADEM) determines whether the Corps’ general permits satisfy the Alabama Coastal Area Management Program. For the 2017 reissuance of NWPs, ADEM imposed four additional conditions specific to NWP 48.<sup>7</sup> Like in Mississippi, the conditions were mainly related to the state’s coastal areas. ADEM required that a permittee must also submit any Corps-required pre-construction notification to the ADEM Mobile-Coastal office, the Alabama Department of Coastal Natural Resources (ADCNR) Marine Resources Division, and the ADCNR-Submerged Land Division (SLD). Further, NWP 48 activities must not occur in close proximity or adversely impact existing wetlands, submersed grassbeds, or natural oyster reefs. The permittee must not place any additional fill onto state-owned submerged lands, and finally, permittees require additional authorization from the ADCNR-SLD if their activities will impact or be located over state-owned submerged lands. Essentially, the ADEM requires additional paperwork where the Corps requires PCN, prohibits the commercial shellfish aquaculture activities described in NWP 48 in two categories of areas, and requires additional approval where activities affect state-owned submerged lands.

## Louisiana

In Louisiana, the Louisiana Department of Natural Resources Office of Coastal Management (OCM) is the agency tasked with determining CZMA consistency with the Louisiana Coastal Resources Program. The OCM prescribed additional conditions for some permits reissued in 2017, but it gave full concurrence to NWP 48 so long as the nine regional conditions given by the Corps' New Orleans District are applied.<sup>8</sup> Regional conditions restrict the place and amount of area NWP activities can affect, such as prohibiting activities that cause the permanent loss or conversion of more than one half acre of cypress swamp or pitcher plant bogs. Other conditions affect land use.<sup>9</sup> In summary, a hopeful permittee for commercial shellfish aquaculture will be subject to nine conditions in addition to those provided by NWP 48 and will likely require project-specific permitting from the New Orleans District engineer.

## Florida

According to an environmental consultant at the Florida State Clearinghouse, which coordinates federal and state activity, the state never published a consistency determination related to NWP 48. The Jacksonville District places nine regional conditions on activities falling under NWP 48, six of which are requirements for PCN. For example, dredging of sediment is not authorized, except in rare circumstances. Six regional conditions define additional circumstances that require PCN based on the location of the activity or a species that it might impact. The last condition prohibits the placement of "live rock" culture as part of NWP 48 activities.<sup>10</sup>

## Actual Barriers to Nationwide Permit 48 Activities

Using these four Gulf Coast states as a sample, state additions to the Corps' conditions for NWP 48 generally fall into two categories: requirements that are the same for all applicants, and those that are project-dependent. Rules that would apply to any applicant include Alabama's requirement to apply for an easement for the operation site, or Florida's online Aquaculture Best Management Practices Manual. The requirements are universal so that applicants would know at the outset whether the proposed area and method of operation fall within the explicit rules.

Project-dependent requirements, however, are likely to add time and resource burdens to the application process.

An applicant may not be sure of all the additional requirements, likelihood of success, or the timeline of their permitting process from the outset for those requirements, such as demonstrating consistency with a state's CZMA.

## Conclusion

While it is not currently practicable to conclude whether a state's approach to NWP 48 dictates the success of aquaculture in that state, it is worth noting that Alabama, a state with seemingly less burdensome conditions, has fourteen commercial oyster operations, which are valued at nearly \$2 million.<sup>11</sup> Florida, too, as of the most recent reports available, has 139 shellfish producers with sales of nearly \$12 million.<sup>12</sup> Meanwhile, Mississippi does not have a commercial shellfish operation, despite the Corps' intentional efforts to make permitting more flexible and streamlined in order to encourage new operations. 🦞

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## Endnotes

1. U.S. Army Corps of Engineers, *Nationwide Permit Reissuance Fact Sheet* (2017).
2. 33 C.F.R. § 330.4(e).
3. 16 U.S.C. § 1546(c).
4. 82 Fed. Reg. 1860 (Jan. 6, 2017).
5. *See* 16 U.S.C. § 4701.
6. [Letter from Mississippi Department of Marine Resources](#) (April 6, 2017).
7. [Letter from Alabama Department of Environmental Management](#) (Jan. 30, 2017).
8. [Letter from State of Louisiana Department of Natural Resources Office of Coastal Management](#) (Feb. 6, 2017).
9. For a full description of the conditions, see, New Orleans District (U.S. Army Corps of Engineers), *Issuance of Nationwide Permits and Regional Conditions for Louisiana* (March 19, 2017).
10. Jacksonville District (U.S. Army Corps of Engineers). 2017 Nationwide Permits Summary of Applicability, Limits, State and Tribal Certifications, and Regional Conditions (March 14, 2017).
11. Mississippi-Alabama Sea Grant, *American Shellfish Aquaculture Situation and Outlook Report 2016* (June 27, 2017).
12. University of Florida, *Online Resource Guide for Florida Shellfish Aquaculture* (2012).