

PUBLIC NOTICE ANNOUNCING
THE REISSUANCE OF THE NATIONWIDE PERMITS
THE APPROVED NATIONWIDE PERMIT REGIONAL CONDITIONS FOR SOUTH
CAROLINA
THE WATER QUALITY CERTIFICATONS AND THE COASTAL ZONE
CONSISTENCY DETERMINATIONS

Date: February 7, 2022

Part I: Nationwide Permits and Regional Conditions

On December 27, 2021, the U.S. Army Corps of Engineers (Corps) published a final rule in the *Federal Register* (86 FR 73522) announcing the reissuance of 40 existing nationwide permits (NWP) and one new NWP. These 41 NWP will go into effect on February 25, 2022, and they will expire on March 14, 2026:

- NWP 1 – Aids to Navigation
- NWP 2 – Structures in Artificial Canals
- NWP 3 – Maintenance
- NWP 4 – Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities
- NWP 5 – Scientific Measurement Devices
- NWP 6 – Survey Activities
- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 8 – Oil and Gas Structures on the Outer Continental Shelf
- NWP 9 – Structures in Fleeting and Anchorage Areas
- NWP 10 – Mooring Buoys
- NWP 11 – Temporary Recreational Structures
- NWP 13 – Bank Stabilization
- NWP 14 – Linear Transportation Projects
- NWP 15 – U.S. Coast Guard Approved Bridges
- NWP 16 – Return Water From Upland Contained Disposal Areas
- NWP 17 – Hydropower Projects
- NWP 18 – Minor Discharges
- NWP 19 – Minor Dredging
- NWP 20 – Response Operations for Oil or Hazardous Substances
- NWP 22 – Removal of Vessels
- NWP 23 – Approved Categorical Exclusions
- NWP 24 – Indian Tribe or State Administered Section 404 Programs
- NWP 25 – Structural Discharges
- NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities
- NWP 28 – Modifications of Existing Marinas

- NWP 30 – Moist Soil Management for Wildlife
- NWP 31 – Maintenance of Existing Flood Control Facilities
- NWP 32 – Completed Enforcement Actions
- 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 Existing Drainage Ditches
- NWP 45 – Repair of Uplands Damaged by Discrete Events
- NWP 46 – Discharges in Ditches
- NWP 49 – Coal Remining Activities
- NWP 53 – Removal of Low-Head Dams
- NWP 54 – Living Shorelines
- NWP 59 – Water Reclamation and Reuse Facilities

The new NWP 59 authorizes discharges of dredged or fill material into waters of the United States for the construction, expansion, and maintenance of water reclamation and reuse facilities.

The Corps has also issued final decision documents for these new and reissued NWPs. These final decision documents are available at www.regulations.gov at docket number COE-2020-0002.

The 40 existing NWPs published in the December 27, 2021, final rule replace the 2017 versions of these NWPs. The 2017 versions of NWPs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 41, 45, 46, 49, 53, and 54 expire on February 24, 2022.

The NWP general conditions and definitions that were issued in the final rule that was published in the January 13, 2021, issue of the *Federal Register* (86 FR 2744) apply to the 40 reissued NWPs and the new NWP 59 that were published in the *Federal Register* on December 27, 2021. Additionally, the existing 16 NWPs (NWPs 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 55, 56, 57, and 58) published in the January 13, 2021, final rule went into effect on March 15, 2021, and remain valid and will expire on March 14, 2026.

Division engineers are authorized to add regional conditions specific to the needs and/or requirements of a particular regional or state. Regional conditions are important mechanisms to ensure that impacts to the aquatic environment authorized by the NWPs are minimal, both individually and cumulatively. The Charleston District's proposal to add regional conditions was noticed on September 29, 2020. Enclosed with today's public notice are the, "FINAL REGIONAL CONDITIONS FOR THE 2021 NATIONWIDE PERMITS IN CHARLESTON DISTRICT (SAC)", which were approved by the South

Atlantic Division Commander on January 31, 2022. These regional conditions become effective on **February 25, 2022**, and are applicable for the **ALL 57 NWP**s.

The 2021 NWP Regional Conditions can also be found on the Charleston District's website at <https://www.sac.usace.army.mil/Missions/Regulatory/Permitting-Process/>.

The December 27, 2021, *Federal Register* notice is available for viewing at <https://www.federalregister.gov/documents/2021/12/27/2021-27441/reissuance-and-modification-of-nationwide-permits>

The January 13, 2021, *Federal Register* notice is available for viewing at: <https://www.federalregister.gov/documents/2021/01/13/2021-00102/reissuance-and-modification-of-nationwide-permits>

As an alternative, interested parties can access the December 27, 2021, and January 13, 2021, final rules and related documents at: <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>

PART II. 401 Water Quality Certification (WQC) and Coastal Zone Consistency (CZC)

The South Carolina Department of Health and Environmental Control (SCDHEC) issued a Notice of Department Decision dated November 25, 2020, followed by 401 Water Quality Certification (WQC) decisions and the Coastal Zone Management Consistency (CZC) decisions in a letter dated December 14, 2020. Specifically, SCDHEC denied the 401 WQCs for NWP's 16, 17, 34, 49, 54 and 59, granted the 401 WQCs without conditions for NWP's 3, 4, 5, 6, 7, 13, 15, 18, 19, 20, 22, 25, 27, 30, 31, 32, 33, 36, 37, 38, 41, 45 and 53, and granted the 401 WQCs with conditions for NWP's 14, 23 and 46. Additional information is provided below. No 401 WQCs are required for NWP's 1, 2, 8, 9, 10, 11, 24, 28 and 35.

With regard to the CZC decisions for NWP's 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 55, 56, 57, and 58, refer to the enclosed "2021 Nationwide Permits Water Quality Certification and Coastal Zone Consistency Rationale for the 16 NWP's."

With regard to the WQC decisions for NWP's 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 55, 56, 57, and 58, refer to the enclosed "Water Quality Certification and Coastal Zone Consistency Rationale for the 16 2021 NWP's."

Also enclosed with today's public notice is the "2021 Nationwide Permits, Water Quality Certifications, Coastal Zone Consistent Determinations and Direct Critical Area Permits

Table and Guide” that provides prospective permittees with assistance in determining WQC and/or CZC requirements for each of the 57 NWP.

A. 401 WQC Denial

In accordance with the Corps’ regulations at 33 CFR § 330.4(c), and as a result of the SCDHEC’s denial of the 401 WQC for certain activities authorized by NWPs 16, 17, 34, 49, 54 and 59 in the State of South Carolina, the Corps has denied authorization for those activities without prejudice until the certifying authority issues an individual 401 WQC or waives the right to do so. Anyone wanting to perform activities under NWPs 16, 17, 34, 49, 54 and 59 must first obtain an individual 401 WQC or waiver.

B. 401 WQCs Issued With Conditions

With regard to NWPs 14, 23 and 46, SCDHEC included the following 401 WQC condition:

“This NWP is not certified for activities located in or adjacent to (as determined by SCDHEC) waters defined (as per Regulation 61-68) as Outstanding National Resource Waters (ONRW), Outstanding Resource Waters (ORW), or Trout Waters.”

The Corps has determined that the “adjacent” waters 401 WQC condition is unacceptable in accordance with 33 CFR § 330.4(c)(2) and (3) and does not comply with the provisions of 33 CFR § 325.4. This condition would require the Corps to search the SCDHEC website or other available information provided and/or managed by SCDHEC to determine which waters in the State of South Carolina are considered ONRWs, ORWs or Trout Waters. Additionally, this condition requires either the Corps to make an “adjacency” determination on behalf of SCDHEC or requires SCDHEC to make the “adjacency” determination during the Corps’ review of PCNs. The Corps views this condition as problematic because the Corps may have a different definition of “adjacency” than SCDHEC, and because making an adjacency determination for SCDHEC is not within the regulatory authority of the Corps. For the reasons described herein, this 401 WQC condition will not be included as a regional condition for NWPs 14, 23 and 46 and consequently, this results in a denial without prejudice of activities under NWP 14, 23 and 46.

While the remaining 401 WQC conditions for NWPs 14, 23 and 46 were otherwise acceptable in accordance with 33 CFR § 330.4(c) and comply with the provisions of 33 CFR § 325.4, these conditions will also not be added as regional conditions because the 401 WQCs with conditions for NWPs 14, 23 and 46 are administratively denied as a result of the Corps’ position that the “adjacent” waters 401 WQC condition discussed above is unacceptable. This administrative denial

determination for the 401 WQC with conditions for NWP 14, 23 and 46 is consistent with the following statement in SCDHEC's December 14, 2020, WQC / CZC letter:

"The Department expects the conditions requested below to be included in the final regional conditions of the Nationwide Permits. If not included, the Department does not have reasonable assurance that the work authorized by the Nationwide Permits will be conducted in a manner consistent with the certification requirements of Section 401 of the CWA, as amended, or the Coastal Tidelands and Wetlands Act (S.C. Code of Laws §48-39-10 et seq.) and SC Coastal Zone Management Program and the certifications are denied for these Nationwide Permits."

Therefore, any prospective permittee wanting to perform activities under NWP 14, 23 and 46 must first obtain an individual 401 WQC or waiver.

C. 401 WQC Issued Without Conditions

As stated above, SCDHEC granted the 401 WQCs without conditions for NWP 3, 4, 5, 6, 7, 13, 15, 18, 19, 20, 22, 25, 27, 30, 31, 32, 33, 36, 37, 38, 41, 45 and 53. Therefore, the Corps will rely on the general 401 WQCs for NWP 3, 4, 5, 6, 7, 13, 15, 18, 19, 20, 22, 25, 27, 30, 31, 32, 33, 36, 37, 38, 41, 45 and 53, and issue authorizations for activities for NWP 3, 4, 5, 6, 7, 13, 15, 18, 19, 20, 22, 25, 27, 30, 31, 32, 33, 36, 37, 38, 41, 45 and 53.

Part III: Coastal Zone Consistency (CZC)

The South Carolina Department of Health and Environmental Control (SCDHEC) issued a Notice of Department Decision dated November 25, 2020, followed by 401 WQC decisions and the Coastal Zone Management Consistency (CZC) decisions in a letter dated December 14, 2020. Specifically, SCDHEC: (1) disagreed with the Corps' CZC determinations, resulting in a denial of CZC for NWP 16, 17, 24, 34, 35, 49, 54 and 59; (2) concurred with the Corps' CZC determinations without conditions for NWP 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 18, 19, 20, 22, 25, 27, 28, 30, 31, 32, 33, 36, 37, 38, 41, 45 and 53; and (3) concurred with the Corps' CZC determinations with conditions for NWP 14, 23 and 46. Additional information is provided below.

With regard to the CZC decisions for NWP 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 55, 56, 57, and 58, refer to the enclosed "Water Quality Certification and Coastal Zone Consistency Rationale for the 2021 16 NWP."

Also enclosed with today's public notice the "2021 Nationwide Permits, Water Quality Certifications, Coastal Zone Consistent Determinations and Direct Critical Area Permits Table and Guide" that provides prospective permittees with assistance in determining WQC and/or CZC requirements for each of the 57 NWP.

A. CZC Denial

In accordance with the Corps' regulations at 33 CFR § 330.4(d), and as a result of the SCDHEC's disagreement with Corps' CZC determinations for certain activities authorized by NWP 16, 17, 24, 34, 35, 49, 54 and 59 in the State of the South Carolina, the Corps has denied authorization for those activities without prejudice until the certifying authority issues an individual CZC concurrence or concurrence can be presumed. Anyone wanting to perform activities under NWP 16, 17, 24, 34, 35, 49, 54 and 59 must first obtain an individual CZC concurrence or demonstrate that concurrence should be presumed.

B. CZC Concurrence With Conditions

1. "Adjacent" Waters CZC Condition

With regard to NWP 14, 23 and 46, SCDHEC included the following CZC condition:

"This NWP is not certified for activities located in or adjacent to (as determined by SCDHEC) waters defined (as per Regulation 61-68) as Outstanding National Resource Waters (ONRW), Outstanding Resource Waters (ORW), or Trout Waters."

The Corps has determined that the "adjacent" waters CZC condition is unacceptable in accordance with 33 CFR § 330.4(d)(2) and (3) and does not comply with the provisions of 33 CFR § 325.4. This condition would require the Corps to search the SCDHEC website or other available information provided and/or managed by SCDHEC to determine which waters in the State of South Carolina are considered ONRWs, ORWs or Trout Waters. Additionally, this condition requires either the Corps to make an "adjacency" determination on behalf of SCDHEC or requires SCDHEC to make the "adjacency" determination during the Corps' review of PCNs. The Corps views this condition as problematic because the Corps may have a different definition of "adjacency" than SCDHEC, and because making an adjacency determination for SCDHEC is not within the regulatory authority of the Corps. Additionally, if SCDHEC is to make the "adjacency" determination during the PCN review, then this condition would grant SCDHEC an opportunity for a second CZC consistency review of projects under NWP 14, 23 and 46. For the reasons described herein, this CZC condition will **not** be included as a regional condition and consequently, the SCDHEC condition is deemed to be a denial without prejudice of NWP 14, 23 and 46 activities and an individual CZC concurrence is required. However, in accordance with 33 CFR § 330.4(d)(6), "upon receipt of an individual consistency concurrence or upon presumed consistency, the proposed work is authorized if it complies with all terms and conditions of the NWP."

2. “Wetland Preservation” CZC Condition

With regard to NWP 14, SCDHEC included the following CZC condition:

“For all projects, the applicant must provide a Wetland Master Plan consistent with the policies and procedures of Chapter III Policy Section XII E. of the S.C. Coastal Zone Management Program. WMP policies also include the preservation of all wetlands not proposed to be impacted through approved restrictive covenants. The plan must include an identification of all wetlands, all wetland impacts/activities, drainage patterns, conceptual development, and a mitigation plan.”

The Corps has determined that this “wetland preservation” CZC condition is unacceptable in accordance with 33 CFR § 330.4(d)(2) and (3) and does not comply with the provisions of 33 § CFR 325.4. This condition requires the prospective permittee to preserve all wetlands not impacted through approved restrictive covenants. The Corps views this condition as problematic for several reasons. The first reason is that SCDHEC is requiring a Wetland Master Plan to be provided that is consistent with Chapter III Policy Section XII E. of the S.C. Coastal Zone Management Program, which is a State program and not a program administered by the Corps. Additionally, the Corps would not otherwise require that a prospective permittee preserve the remaining wetlands. Therefore, this CZC condition was determined to be unacceptable on that basis alone. Second, the Corps cannot legally require a prospective permittee to preserve all remaining wetlands onsite. The condition indicates that the preservation would be required regardless of whether compensatory mitigation for the authorized impacts is required. Third, if authorized impacts require compensatory mitigation, a compensatory mitigation plan must comply with the 2008 Mitigation Rule (2008 Mitigation Rule) and the Charleston District’s *Guidelines for Preparing a Compensatory Mitigation Plan* (Charleston District Guidelines). The 2008 Mitigation Rule (33 CFR Part 332) specifically identifies an order by which mitigation should follow with the purchase of mitigation bank credits being the preferred option that is followed in preference by in-lieu fee program credits, permittee-responsible mitigation under a watershed approach, permittee-responsible mitigation through on-site and in-kind mitigation, and then permittee-responsible mitigation through off-site and/or out-of-kind mitigation. With regard to preservation, 33 CFR § 332.3(h) states as follows:

“preservation may be used to provide compensatory mitigation for activities authorized by DA permits when all the following criteria are met: (1) Preservation may be used to provide compensatory mitigation for activities authorized by DA permits when all the following criteria are met: (i) The resources to be preserved provide important physical, chemical, or biological functions for the watershed; (ii) The resources to be preserved contribute significantly to the ecological sustainability of the watershed. In determining the contribution of those resources to the ecological sustainability of the watershed, the district engineer must use appropriate quantitative assessment tools, where available; (iii) Preservation is

determined by the district engineer to be appropriate and practicable; (iv) The resources are under threat of destruction or adverse modifications; and (v) The preserved site will be permanently protected through an appropriate real estate or other legal instrument (e.g., easement, title transfer to state resource agency or land trust). (2) Where preservation is used to provide compensatory mitigation, to the extent appropriate and practicable the preservation shall be done in conjunction with aquatic resource restoration, establishment, and/or enhancement activities. This requirement may be waived by the district engineer where preservation has been identified as a high priority using a watershed approach described in paragraph (c) of this section, but compensation ratios shall be higher.”

Additionally, Charleston District Guidelines provide an option for prospective permittees and applicants to receive a 25% reduction in the amount of required mitigation credits, if the wetlands to be preserved meet certain criteria described in the Guidelines. If the prospective permittee or applicant choose not to preserve the remaining wetlands or the remaining wetlands do not qualify for the 25% reduction in the amount of required credits, the prospective permittee or applicant may purchase the full amount of required credits from a mitigation bank or propose alternative mitigation. Therefore, this CZC condition was also determined to be inconsistent with the 2008 Mitigation Rule (33 CFR Part 332). Lastly, the CZC condition requires that the remaining wetlands be preserved through “approved restrictive covenants” and that the Wetland Master Plan “include an identification of all wetlands, all wetland impacts/activities, drainage patterns, conceptual development, and a mitigation plan.” The Corps would not otherwise require this information; therefore, this CZC condition was determined to be unacceptable on this basis. Additionally, the condition requires that the Corps review this information on behalf of SCDHEC OCRM or requires that SCDHEC OCRM review the Wetland Master Plan during the Corps’ review of PCNs. The Corps would not otherwise require this information. For the reasons described herein, this CZC condition will **not** be included as a regional condition and consequently, SCDHEC’s condition is deemed to be a denial of CZC concurrence without prejudice of NWP 14 activities and an individual CZC concurrence is required. However, in accordance with 33 CFR § 330.4(d)(6), “upon receipt of an individual consistency concurrence or upon presumed consistency, the proposed work is authorized if it complies with all terms and conditions of the NWP.”

3. NWP 14

While the remaining CZC conditions for NWP 14 were otherwise acceptable in accordance with 33 CFR § 330.4(d) and comply with the provisions of 33 CFR § 325.4, these conditions will also not be added as regional conditions because the CZC with conditions for NWP 14 are administratively denied as a result of the Corps’ position that the “adjacent” waters CZC condition and “wetland preservation” CZC condition discussed above are both unacceptable.

4. NWP's 23 and 46

While the remaining CZC conditions for NWP's 23 and 46 were otherwise acceptable in accordance with 33 CFR § 330.4(d) and comply with the provisions of 33 CFR § 325.4, these conditions will also not be added as regional conditions because the CZC with conditions for NWP 23 and 46 are administratively denied as a result of the Corps' position that the "adjacent" waters CZC condition discussed above is unacceptable.

The above administrative denial determinations for the CZC with conditions for NWP's 14, 23 and 46 are consistent with the following statement in SCDHEC's December 14, 2020, WQC / CZC letter:

"The Department expects the conditions requested below to be included in the final regional conditions of the Nationwide Permits. If not included, the Department does not have reasonable assurance that the work authorized by the Nationwide Permits will be conducted in a manner consistent with the certification requirements of Section 401 of the CWA, as amended, or the Coastal Tidelands and Wetlands Act (S.C. Code of Laws §48-39-10 et.seq.) and SC Coastal Zone Management Program and the certifications are denied for these Nationwide Permits."

Therefore, anyone wanting to perform activities under NWP's 14, 23 and 46 must first obtain an individual CZC concurrence or demonstrate that concurrence should be presumed.

C. CZC Issued Without Conditions

As stated above, SCDHEC concurred with the Corps' CZC determinations without conditions for NWP's 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 18, 19, 20, 22, 25, 27, 28, 30, 31, 32, 33, 36, 37, 38, 41, 45 and 53. Therefore, the Corps will rely on the general CZC concurrence for NWP's 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 18, 19, 20, 22, 25, 27, 28, 30, 31, 32, 33, 36, 37, 38, 41, 45 and 53, and issue authorizations for activities for NWP's 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 18, 19, 20, 22, 25, 27, 28, 30, 31, 32, 33, 36, 37, 38, 41, 45 and 53.

D. CZC General Condition

SCDHEC's December 14, 2020, WQC / CZC letter provides the following CZC General Condition:

Activities in the Critical Areas (as defined in 48-39-10, R 30.1(D) and R 30.10) require a direct permit from SCDHEC OCRM [South Carolina Department of Health and Environmental Control – Office

of Ocean and Coastal Resource Management]. SCDHEC OCRM's action on direct critical area permits will serve as the consistency determination for the critical area activity.

The Charleston District has determined that the CZC General Condition is acceptable in accordance with 33 CFR § 330.4(d), complies with the provisions of 33 CFR § 325.4, and will be included as Regional Condition.

Part IV. Public Notice Enclosures

“FINAL REGIONAL CONDITIONS FOR THE 2021 NATIONWIDE PERMITS IN CHARLESTON DISTRICT (SAC)”

“2021 Nationwide Permits, Water Quality Certifications, Coastal Zone Consistent Determinations and Direct Critical Area Permits Table and Guide” dated February 4, 2022

“Water Quality Certification and Coastal Zone Consistency Rationale for the 16 2021 NWPs”



DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, CHARLESTON DISTRICT
69A HAGOOD AVENUE
CHARLESTON, SOUTH CAROLINA 29403-5107

FINAL REGIONAL CONDITIONS FOR THE 2021 NATIONWIDE PERMITS IN CHARLESTON DISTRICT (SAC)

Effective Date for Modified Regional Conditions for 16 NWP: January 19, 2022
Effective Date for Regional Conditions for 41 NWP: February 25, 2022
Expiration Date for Regional Conditions for All NWP: March 14, 2026

This Regional Condition document supersedes all prior Regional Condition documents for the Charleston District.

A. BACKGROUND/APPLICABILITY

1. The following regional conditions have been approved by the Division Engineer for the South Atlantic Division (SAD) for use in the Charleston District (SAC) for the following Nationwide Permits (NWP):
 - a. The NWP published in the January 13, 2021 Federal Register (86 FR 2744) announcing the reissuance of twelve (12) existing NWP (that is, NWP 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, and 52) and issuance of four (4) new NWP (that is, NWP 55, 56, 57, and 58), as well as the reissuance of NWP general conditions and definitions with some modifications. These 16 NWP were effective on March 15, 2021 and will expire on March 14, 2026; and
 - b. The NWP published in the December 27, 2021 Federal Register (86 FR 73522) announcing the reissuance of the remaining unmodified forty (40) existing NWP (that is, NWP 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 41, 45, 46, 49, 53, and 54) and issuance of one (1) new NWP (that is, NWP 59). At this time, NWP 26 and 47 are reserved. These 41 NWP will be effective as of February 25, 2022 and will expire on March 14, 2026.
2. Status of Activities Under Prior NWP and/or Regional Conditions.
 - i. 16 NWP: The modified regional conditions that were issued on January 19, 2022 and are incorporated in this document **supersede** the previous regional conditions that were approved for the 16 NWP that went into effect on March 15, 2021, **except** for the following scenarios:
 1. NWP verification letters for one or more of the 16 NWP that were issued **prior** to January 19, 2022; or

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2. NWP activities that do not require a pre-construction notification (PCN)¹, are covered by one or more of the 16 NWPs, and have either commenced, are under contract to commence, or have been completed **prior** to January 19, 2022.
 - ii. 40 NWPs: For information about whether an activity can continue under the 2017 versions of the 40 existing NWPs (for example, the status of prior permit verifications and pre-construction notifications) and, accordingly, the 2017 Regional Conditions, see the discussion in the Reissuance and Modification of Nationwide Permits at 86 FR 73522 in Section I.D. on page 73525 or contact the Charleston District Regulatory Office directly.
3. The following regional conditions will provide additional protection for the aquatic environment that is necessary to ensure that the NWPs authorize only those activities with no more than minimal adverse environmental effects.
4. As specified, under NWP General Condition 27, Regional and Case-By-Case Conditions: The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case-specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its Section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

B. EXCLUDED WATERS AND/OR AREAS

Not applicable.

C. REGIONAL CONDITIONS APPLICABLE TO ALL NWPs

1. Use of nationwide permits does not preclude requirements to obtain all other applicable Federal, State, county, and local government authorizations.
2. NWP activities are not authorized in areas known or suspected to have sediment contamination, with the exception of the following: (1) activities authorized by NWP 38; (2) activities authorized by NWP 53 when used in combination with NWP 38; (3) sediment sampling for dredging projects authorized by NWP 6; and (4) activities authorized by NWP 20.
3. For all proposed activities, both temporary and permanent, that would be located within a FEMA designated floodway, the prospective permittee must submit a PCN to the District Engineer in accordance with General Condition 32.

¹ The acronym "PCN" used throughout this document refers to *Pre-Construction Notification*, as defined in NWP General Condition 32.

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4. For all NWPs, the prospective permittee must submit a PCN to the District Engineer in accordance with General Conditions 31 and 32, for any activity that would be located in or adjacent to an authorized USACE Civil Works project, including Federal Navigation projects:
 - a. **USACE Civil Works projects:** Buck Creek in Horry County, Eagle Creek in Dorchester County, Kingstree Branch in Williamsburg County, Sawmill Branch in Berkeley and Dorchester Counties, Scotts Creek in Newberry County, Socastee Creek in Horry County and Turkey Creek in Sumter County, Wilson Branch in Chesterfield County, Edisto River in Orangeburg and Dorchester Counties, North Edisto River in Aitken and Orangeburg Counties, Folly Beach in Charleston County, Hunting Island Beach, waste water treatment plant and water line in Beaufort County, Myrtle Beach in Georgetown and Horry County, Pawleys Island Beach in Georgetown County, Edisto Island Beach in Charleston County, Crab Bank in Charleston County, Morris Island Lighthouse in Charleston County, Miller Corner Disposal area Phragmites Control in Georgetown County, Cape Marsh Management area (Santee Coastal Reserve) in Charleston County, Murphy Island in Charleston County, Pocotaligo River and Swamp in Clarendon and Sumter Counties, Pinopolis Dam in Berkeley County, Battery Pringle in Charleston County, Castle Pinckney in Charleston County, Pompion Hill Chapel along the Cooper River in Berkeley County, Drayton Hall in Charleston County, Indian Bluff in Orangeburg County, Singleton Swash at Shore Drive in Horry County, Turkey Creek Bridge at Pineview Drive in Lancaster, Big Dutchman Creek Bridge at West Oak Drive in Rock Hill, SC, Calabash Branch Bridge at Tom Joye Road in Clover, Blue Branch Bridge at Fortanberry Road in Gaffney, Glenn Creek Bridge at Sulphur Springs Road in Spartanburg County, Cow Castle Creek (Bowman) in Orangeburg County, Cowpen Swamp at Simpson Creek in Horry County, Crabtree Swamp in Horry County, Saluda River (North, South, and Middle Fork) in Greenville County, Shot Pouch Creek in Sumter County, Simpson Creek in Horry County, and Todd Swamp in Horry County.
 - b. **Defined Federal Navigation projects:** Ashley River (0.5 miles east of Hwy 7 bridge downstream to the Atlantic Intracoastal Waterway (AIWW)), Atlantic Intracoastal Waterway ((AIWW) GA/SC line to SC/NC line), Brookgreen Garden Canal, Calabash Creek, Charleston Harbor (including the Cooper River, Town Creek, Shem Creek to Coleman Blvd and Mount Pleasant Channel), Folly River, Georgetown Harbor (Winyah Bay, Sampit River and Bypass Channel), Jeremy Creek, Little River Inlet, Murrells Inlet (Main Creek), Port Royal Harbor, Shipyard River, Savannah River (Below Augusta) and Town Creek McClellanville (i.e., Five Fathoms Creek, AIWW to Bulls Bay).
 - c. **Undefined Federal Navigation projects:** Adams Creek, Archers Creek (From intersection with Beaufort River for 2 miles), Edisto River (River mile 0.00 to 175.0), Great Pee Dee River (Waccamaw River via Bull Creek then to

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Smith Mills, then to Cheraw), Lynches River/Clark Creek (Clark Creek to Lynches River, River Mile 0.0 to 56.0), Mingo Creek (to Hemmingway Bridge), Salkehatchie River (5 miles above Toby's Bluff to Hickory Hill, River mile 20.4 to 62.3), Santee River (Closed to navigation at mile 87 (Santee Dam)), Waccamaw River (river mile 0.0 to 90 (state line)), Wateree River (Mouth to Camden), and Village Creek (Morgan River to Porpoise Fish Co., 2.2 miles).

5. For all proposed activities that would be located in or adjacent to an authorized Federal Navigation project, as referenced in Regional Condition C.4.b, the project drawings must include the following information: (1) State Plane Coordinates (NAD 1983) for a minimum of two corners of each structure or fill where it is closest to the Federal channel; (2) the distance from the watermost edge of the proposed structure or fill to the nearest edge of the Federal channel; and (3) Mean Low Water line and the Mean High Water line.
6. For all NWPs requiring a PCN and when the activity involves the discharge of dredged or fill material into waters of the U.S. associated with mechanized land clearing that results in the permanent conversion of forested or scrub-shrub wetlands to herbaceous wetlands, the PCN should include the following information: (1) a written description and/or drawings of the proposed conversion activity and (2) acreage of the permanent conversion.

D. REGIONAL CONDITIONS APPLICABLE TO SPECIFIC NWPs

1. For NWP 3, paragraph (a) activities, the prospective permittee must submit a PCN to the District Engineer in accordance with General Condition #32 for the repair, rehabilitation or replacement of existing utility lines, which include electric lines and/or telecommunication lines, constructed over navigable waters of the United States (i.e., Section 10 waters), and existing utility lines, electric lines, telecommunication lines and/or pipelines routed in or under navigable waters of the United States (i.e., Section 10 waters), even if no discharge of dredged or fill material occurs.
2. For NWP 3, the prospective permittee must submit a PCN to the District Engineer in accordance with General Condition 32, for maintenance activities related to stormwater management that would occur in tidal waters, including tidal wetlands.
3. For NWPs 3, 11, 12, 13, 14, 15, 20, 22, 33, 57, 58, and 59, temporary structures, fills, and/or work, including the use of temporary mats, are authorized for the minimum amount of time necessary to accomplish the work, which shall not exceed a period of 180 days without additional Corps approval. **However, temporary sidecast material authorized by NWPs 12, 57, or 58 cannot ever exceed a period of 180 days.** The temporary structures, fills, and/or work, including the use of temporary mats, shall be removed as soon as the work is

2021-2022 NWP REGIONAL CONDITIONS FOR CHARLESTON DISTRICT (SAC)

complete and the disturbed areas be restored to pre-construction contours and conditions. The temporary mats include timber mats, metal, synthetic and/or artificial mats, or other materials that may serve the purpose of mats.

4. For NWPs 3, 11, 12, 13, 14, 15, 20, 22, 33, 57, 58 and 59 that require PCNs and when the activity involves temporary structures, fills, and/or work, including the use of temporary mats, the PCN should include the following information: (1) a written description and/or drawings of the proposed temporary activities that will be used during project construction; (2) the timeframe that the proposed temporary activities will be in place; and (3) specifications of how pre-construction contours will be re-established and verified after construction. Temporary mats include timber mats, metal, synthetic and/or artificial mats, or other materials that may serve the purpose of mats.
5. For NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, 52, 57 and 58 in accordance with General Condition 22(a) and for NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38 and 54, in accordance with General Condition 22(b), the ACE Basin National Estuarine Research Reserve and the North Inlet Winyah Bay National Estuarine Research Reserve are Designated Critical Resource Waters. Activities described in the NWPs listed herein are subject to the limitations and/or PCN requirements listed in General Condition 22 (a) and (b).
6. For NWPs 7 and 58 activities that involve intake structures, the associated intake structure must be screened to prevent entrainment of juvenile and larval organisms, and the inflow velocity of the associated intake structures cannot exceed 0.5 feet/second.
7. For NWPs 12, 57 and 58 activities that involve horizontal directional drilling beneath navigable waters of the United States (i.e., Section 10 waters), the PCN should include a proposed remediation plan (i.e., frac-out plan).
8. For NWPs 12, 14, 29, 39, 46, 51, 52, 57 and 58 activities that involve crossings, all culverts must be adequately sized to maintain flow. For these activities that require submittal of a PCN, the PCN should include the minimum size of and number of culvert/pipes that are proposed.
9. For NWPs 12, 14, 18, 43, 51, 57 and 58, the prospective permittee must submit a PCN to the District Engineer in accordance with General Condition #32, for activities that involve the loss of greater than 0.005 acre of stream bed.
10. For NWPs 12, 14, 18, 21, 29, 39, 40, 42, 43, 44, 50, 51, 52, 57, 58 and 59, activities that involve the loss of greater than 0.005 acre of stream bed, compensatory mitigation will be required and the PCN should include a compensatory mitigation plan.

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11. For NWPs 12, 14, 18, 21, 27, 29, 39, 40, 42, 43, 44, 50, 51, 52, 57, 58, and 59, the discharge cannot cause the loss of greater than 0.05 acre of stream bed.
12. For NWPs 29 and 39, the discharges of dredged or fill material for the construction of stormwater management facilities in perennial streams are not authorized.
13. For NWP 33, the prospective permittee must submit a PCN to the District Engineer, in accordance with General Condition #32, for temporary construction, access, and dewatering activities that impact greater than 0.1 acre of non-tidal waters of the United States, including wetlands. In addition, the PCN should include a restoration plan.
14. For existing NWP 48 activities that involve changing from bottom culture to floating or suspended culture OR proposed NWP 48 activities that involve floating or suspended culture, the prospective permittee must submit a PCN to the District Engineer in accordance with General Condition #32.
15. For proposed NWP 48 activities involving floating or suspended culture and/or proposed NWPs 55 and 56 activities that will occur adjacent to property that is not owned by the prospective permittee, the PCN should include the following information:
 - a. A map or depiction that shows the adjacent property(ies) and adjacent property owners' contact information. Note: This information may be obtained online from the applicable county's tax information pages.
 - b. A signed letter(s) of "no objection" to the proposed mariculture activity from each of the adjacent property owner(s). Each letter shall include the name, mailing address, property address, property Tax Map Parcel (TMS) number, and signature of the property owner. Or, if the prospective permittee is unable to obtain a letter(s) of "no objection", the Corps will notify the adjacent property owner(s) of the proposed project by letter wherein the adjacent property owner will be given 15 days to provide comments.
16. For NWP 53, the PCN should include a Tier I evaluation, in accordance with the Inland Testing Manual, for the project area immediately upstream of the low-head dam. If the Tier I evaluation indicates contaminated sediments are present, a Tier II evaluation may be required.
17. The prospective permittee is advised of the following for activities under any NWP for which (1) the 401 Water Quality Certifications (WQC) were denied (see F.1.a), and/or (2) activities under the NWP were found to be inconsistent with the S.C. Coastal Zone Management Program and, therefore, concurrence with the Coastal Zone Consistency determination was denied (see F.2.a), and/or (3) the

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proposed activity is located in one of the “Critical Areas” of the Coastal Zone (see F.3):

- a. For NWPs 12, 14, 16, 17, 21, 23, 29, 34, 39, 44, 46, 49, 50, 54, 57, 58 and 59 where WQC was denied, the prospective permittee should provide to the Corps a copy of the Individual WQC or evidence demonstrating a waiver was granted.
- b. For NWPs 12, 14, 16, 17, 21, 23, 24, 29, 34, 35, 39, 42, 44, 46, 49, 50, 51, 55, 56, 57, 58 and 59 where concurrence with the Coastal Zone Consistency was denied, the prospective permittee should provide to the Corps a copy of the Individual CZC Concurrence or presumed concurrence for the proposed activity.
- c. For all NWPs in any of the “Critical Areas” of the Coastal Zone, an Individual Critical Area permit is required (see F.3). Therefore, the prospective permittee should provide a copy of the Individual Critical Area permit to the Corps for the proposed activity.

Note: For WQC conditions on activities under NWPs 43, 51, and 52, see F.1.b. For Coastal Zone Consistency conditions on activities under NWPs 43 and 52, see F.2.b.

18. For NWPs 12, 57 and 58, the prospective permittee must submit a PCN to the District Engineer in accordance with General Condition 32 if the activity involves the discharge of dredged or fill material into waters of the U.S. associated with mechanized land clearing that results in the permanent conversion of forested or scrub-shrub wetlands to herbaceous wetlands for a maintained right-of-way.

E. ACTIVITY SPECIFIC REGIONAL CONDITIONS

Not applicable.

F. SECTION 401 WATER QUALITY CERTIFICATION (WQC) AND/OR COASTAL ZONE MANAGEMENT ACT (CZMA) CONSISTENCY DETERMINATION SUMMARY AND APPLICABLE CONDITIONS

1. Water Quality Certification (WQC)

a. WQC Denied

The Water Quality Certifications (WQC) for the following NWPs are denied; therefore, an Individual WQC, or evidence demonstrating a waiver was granted, from the South Carolina Department of Health and Environmental Control (SCDHEC) will be required for authorization under these NWPs:

2021-2022 NWP REGIONAL CONDITIONS FOR CHARLESTON DISTRICT (SAC)

NWPs 12, 14, 16, 17, 21, 23, 29, 34, 39, 44, 46, 49, 50, 54, 57, 58 and 59.

b. **WQC Granted With Conditions**

The following WQC Conditions, as stated in the SCDHEC's Notice of Department Decision dated November 25, 2020, are also considered 2021 NWP Regional Conditions:

- i. For NWP 43, "Activities authorized by this certification are limited to maintenance of existing facilities, such as stormwater ponds, detention and retention basins, water control structures, outfall structures, emergency spillways, and existing ponds, that are proposed for use as water quantity or volume control. This NWP cannot be used for existing ponds that are proposed to be converted into water quality treatment facilities, such as sediment basins, sediment traps, or other similar structures."
- ii. For NWP 51, "This NWP is not certified for activities that cause the loss of more than 300 linear feet of stream bed."
- iii. For NWP 52, "This NWP is not certified for activities that cause the loss of more than 300 linear feet of stream bed."

c. **WQC Granted Without Conditions**

The WQCs for NWPs 3, 4, 5, 6, 7, 13, 15, 18, 19, 20, 22, 25, 27, 30, 31, 32, 33, 36, 37, 38, 40, 41, 42, 45, 48 and 53 were granted without conditions.

d. **No WQC Required**

NWPs 1, 2, 8, 9, 10, 11, 24, 28, 35, 55 and 56 do not require WQCs.

2. **Coastal Zone Consistency (CZC)**

a. **CZC Concurrence Denied**

The following NWPs were found to be inconsistent with the S.C. Coastal Zone Management Program; thus, the CZC concurrence is denied and an Individual CZC concurrence, or presumed concurrence for the proposed activity, will be required for these NWPs:

NWPs 12, 14, 16, 17, 21, 23, 24, 29, 34, 35, 39, 42, 44, 46, 49, 50, 51, 54, 55, 56, 57, 58 and 59.

b. **CZC Concurrence Granted With Conditions**

2021-2022 NWP REGIONAL CONDITIONS FOR CHARLESTON DISTRICT (SAC)

The following CZC Conditions, as stated in the SCDHEC's Notice of Department Decision dated November 25, 2020, are also considered 2021 NWP Regional Conditions:

- i. For NWP 43, "Activities authorized by this certification are limited to maintenance of existing facilities, such as stormwater ponds, detention and retention basins, water control structures, outfall structures, emergency spillways, and existing ponds that are proposed for use as water quantity or volume control. This NWP cannot be used for existing ponds that are proposed to be converted into water quality treatment facilities such as sediment basins, sediment traps, or other similar structures."
- ii. For NWP 52, "This NWP is not certified for activities that cause the loss of more than 300 linear feet of stream bed."

c. **CZC Concurrence Granted Without Conditions**

The CZCs for NWPs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 18, 19, 20, 22, 25, 27, 28, 30, 31, 32, 33, 36, 37, 38, 40, 41, 45, 48 and 53 were granted without conditions.

d. **No CZC required**

Not applicable.

3. **Coastal Zone Consistency (CZC) General Condition**

The following CZC General Condition, as stated in the SCDHEC 401/CZC Letter dated December 14, 2020, is considered a 2021 NWP Regional Condition:

For all NWPs, "Activities in the Critical Areas (as defined in 48-39-10, R 30.1(D) and R 30.10) require a direct permit from SCDHEC OCRM. SCDHEC OCRM's action on direct critical areas permits will serve as the consistency determination for the critical area activity."

G. **DISTRICT POINT OF CONTACT**

Tracy D. Sanders
USACE- Charleston District
69A Hagood Avenue
Charleston, South Carolina 29403
843-329-8044
Tracy.d.sanders@usace.army.mil
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2021 Nationwide Permits, Water Quality Certifications, Coastal Zone Consistency Determinations and Direct Critical Area Permits Table and Guide

The below table has been developed by the Charleston District to assist prospective permittees with determining which state permits may be required, as well as the Water Quality Certifications and/or Coastal Zone Consistency conditions that would apply to a specific NWP in the State of South Carolina. The prospective permittee should also review the Charleston District's "FINAL REGIONAL CONDITIONS FOR THE 2021 NATIONWIDE PERMITS IN CHARLESTON DISTRICT (SAC)" to determine additional NWP specific limits and/or requirements, which can be found at <https://www.sac.usace.army.mil/Missions/Regulatory/Permitting-Process/>.

Acronyms:

NWP: Nationwide Permit

WQC: Water Quality Certification

CZC: Coastal Zone Consistency

CAP: Critical Area Permit

SCDHEC: South Carolina Department of Health and Environmental Control

OCRM: Office of Ocean and Coastal Resource Management

Table

NWP	WQC	CZC	CAP
1	N/A	Issued	See condition 3
2	N/A	Issued	See condition 3
3	Issued	Issued	See condition 3
4	Issued	Issued	See condition 3
5	Issued	Issued	See condition 3
6	Issued	Issued	See condition 3
7	Issued	Issued	See condition 3
8	N/A	Issued	See condition 3
9	N/A	Issued	See condition 3
10	N/A	Issued	See condition 3
11	N/A	Issued	See condition 3
12	Denied*	Denied**	See condition 3
13	Issued	Issued	See condition 3
14	Denied*	Denied**	See condition 3
15	Issued	Issued	See condition 3
16	Denied*	Denied**	See condition 3
17	Denied*	Denied**	See Condition 3
18	Issued	Issued	See condition 3
19	Issued	Issued	See condition 3

NWP	WQC	CZC	CAP
20	Issued	Issued	See condition 3
21	Denied*	Denied**	See condition 3
22	Issued	Issued	See condition 3
23	Denied *	Denied**	See condition 3
24	N/A	Denied**	See condition 3
25	Issued	Issued	See condition 3
27	Issued	Issued	See condition 3
28	N/A	Issued	See condition 3
29	Denied*	Denied**	See condition 3
30	Issued	Issued	See condition 3
31	Issued	Issued	See condition 3
32	Issued	Issued	See condition 3
33	Issued	Issued	See condition 3
34	Denied*	Denied**	See condition 3
35	N/A	Denied**	See condition 3
36	Issued	Issued	See condition 3
37	Issued	Issued	See condition 3
38	Issued	Issued	See condition 3
39	Denied*	Denied**	See condition 3
40	Issued, no conditions	Issued, no conditions	See condition 3
41	Issued	Issued	See condition 3
42	Issued, no conditions	Denied**	See condition 3
43	See condition 1	See condition 1	See condition 3
44	Denied*	Denied**	See condition 3
45	Issued	Issued	See condition 3
46	Denied*	Denied**	See condition 3
48	Issued, no conditions	Issued, no conditions	See condition 3
49	Denied*	Denied**	See condition 3
50	Denied*	Denied**	See condition 3
51	See condition 2	Denied**	See condition 3
52	See condition 2	See condition 2	See condition 3
53	Issued	Issued	See condition 3
54	Denied*	Denied**	See condition 3
55	Not applicable	Denied**	See condition 3
56	Not applicable	Denied**	See condition 3
57	Denied*	Denied**	See condition 3
58	Denied*	Denied**	See condition 3
59	Denied*	Denied**	See condition 3

* Denied WQC: The prospective permittee must obtain an Individual 401 WQC from SCDHEC or waiver prior to verification of the NWP by the Corps.

**Denied CZC: The prospective permittee must obtain an Individual CZC concurrence or demonstrate that concurrence is presumed prior to beginning the authorized work.

Condition 1 (WQC/CZC):

“Activities authorized by this certification are limited to maintenance of existing facilities, such as stormwater ponds, detention and retention basins, water control structures, outfall structures, emergency spillways, and existing ponds that are proposed for use as water quantity or volume control. This NWP cannot be used for existing ponds that are proposed to be converted into water quality treatment facilities such as sediment basins, sediment traps, or other similar structures.”

Condition 2 (WQC/CZC):

“This NWP is not certified for activities that cause the loss of more than 300 linear feet of stream bed.”

Condition 3 (CA):

“Activities in the Critical Areas (as defined in 48-39-10, R 30.1(D) and R 30.10) require a direct permit from SCDHEC OCRM. SCDHEC OCRM's action on direct critical area permits will serve as the consistency determination for the critical area activity.”

The prospective permittee must obtain the CA Permit, which also serves as the CZC from OCRM, prior to beginning the authorized work.

Water Quality Certification and Coastal Zone Consistency Rationale for the 16 2021 NWP

Part I: 401 Water Quality Certification (WQC)

The South Carolina Department of Health and Environmental Control (SCDHEC) issued a Notice of Department Decision dated November 25, 2020, followed by 401 WQC decisions and the Coastal Zone Management Consistency (CZC) decisions in a letter dated December 14, 2020. Specifically, SCDHEC denied the 401 WQCs for NWP 21 and 50, granted the 401 WQCs without conditions for NWP 40, 42 and 48, and granted the 401 WQCs with conditions for NWP 12, 29, 39, 43, 44, 51, 52, 57 and 58. No 401 WQCs are required for NWP 55 and 56.

Enclosed with today's public notice the "2021 Nationwide Permits, Water Quality Certifications, Coastal Zone Consistent Determinations and Direct Critical Area Permits Table and Guide" that assists with determining WQC and/or CZC requirements for each of the 57 NWP.

A. 401 WQC Denial

In accordance with the U.S. Environmental Protection Agency's (EPA's) current water quality certification regulations at 40 CFR Part 121, the Charleston District has reviewed SCDHEC's denial of the 401 WQCs for NWP 21 and 50 and has determined that the denials satisfy the requirements set forth in 40 CFR § 121.7(e)(2). Furthermore, in accordance with the Corps' regulations at 33 CFR § 330.4(c), and as a result of the SCDHEC's denial of the 401 WQC for certain activities authorized by NWP 21 and 50 in State of South Carolina, the Corps has denied authorization for those activities without prejudice until the certifying authority issues an individual 401 WQC or waives the right to do so. Anyone wanting to perform activities under NWP 21 and 50 must first obtain an individual 401 WQC or waiver.

Please see the enclosed public notice that was issued on February 3, 2021, by the Charleston District announcing the Clean Water Act Section 401 Certification Rule. This public notice may also be found on the Charleston District's website at <https://www.sac.usace.army.mil/Missions/Regulatory/Public-Notices/Article-View/Article/2491488/special-public-notice-clean-water-act-section-401-certification-rule/>.

B. 401 WQCs Issued With Conditions

The Charleston District has reviewed SCDHEC's issuance of the 401 WQCs with conditions for NWP 12, 29, 39, 43, 44, 51, 52, 57 and 58 and has determined that the 401 WQCs satisfy the requirements set forth in 40 CFR § 121.7(d)(2). Furthermore, the Charleston District has determined that the following SCDHEC 401 WQC conditions for

NWPs 43, 51 and 52 are acceptable in accordance with 33 CFR § 330.4(c), comply with the provisions of 33 CFR § 325.4, and will be included as Regional Conditions.

For NWP 43:

“Activities authorized by this certification are limited to maintenance of existing facilities, such as stormwater ponds, detention and retention basins, water control structures, outfall structures, emergency spillways, and existing ponds that are proposed for use as water quantity or volume control. This NWP cannot be used for existing ponds that are proposed to be converted into water quality treatment facilities such as sediment basins, sediment traps, or other similar structures.”

For NWPs 51 and 52:

“This NWP is not certified for activities that cause the loss of more than 300 linear feet of stream bed.”

Therefore, the Corps will rely on the general 401 WQCs for NWPs 43, 51 and 52, and issue authorizations for the discharges into waters of the United States for NWPs 43, 51 and 52.

The above conditions can be found on Section F of the enclosed “FINAL REGIONAL CONDITIONS FOR 16 NATIONWIDE PERMITS IN CHARLESTON DISTRICT (SAC).”

With regard to NWPs 12, 29, 39, 44, 57 and 58, SCDHEC included the following 401 WQC condition:

“This NWP is not certified for activities located in or adjacent to (as determined by SCDHEC) waters defined (as per Regulation 61-68) as Outstanding National Resource Waters (ONRW), Outstanding Resource Waters (ORW), or Trout Waters.”

The Corps has determined that the “adjacent” waters 401 WQC condition is unacceptable in accordance with 33 CFR § 330.4(c)(2) and (3) and does not comply with the provisions of 33 CFR § 325.4. This condition would require the Corps to search the SCDHEC website or other available information provided and/or managed by SCDHEC to determine which waters in the State of South Carolina are considered ONRWs, ORWs or Trout Waters. Additionally, this condition requires either the Corps to make an “adjacency” determination on behalf of SCDHEC or requires SCDHEC to make the “adjacency” determination during the Corps’ review of PCNs. The Corps views this condition as problematic because the Corps may have a different definition of “adjacency” than SCDHEC, and because making an adjacency determination for SCDHEC is not within the regulatory authority of the Corps. Furthermore, if SCDHEC is to make the “adjacency” determination during the PCN review, then this condition would grant SCDHEC an opportunity for a second certification review of projects under NWPs

12, 29, 39, 44, 57 and 58, which is not permissible according to 40 CFR § 121.6(e); 85 Fed. Reg. 42210, at 42280 (July 13, 2020) (“The final rule does not include an explicit prohibition on reopener clauses because the EPA has concluded that such conditions are already proscribed by section 121.6(e) of the final rule. By including a reopener condition in a certification, the certifying authority intends to take an action to reconsider or otherwise modify a previously issued certification at some unknown point in the future.”). For the reasons described herein, this 401 WQC condition will not be included as a RC and consequently, this results in a denial without prejudice of activities under NWP 12, 29, 39, 44, 57 and 58.

While the remaining 401 WQC conditions for NWP 12, 29, 39, 44, 57 and 58 were otherwise acceptable in accordance with 33 CFR § 330.4(c) and comply with the provisions of 33 CFR § 325.4, these conditions will also not be added as regional conditions because the 401 WQCs with conditions for NWP 12, 29, 39, 44, 57 and 58 are administratively denied as a result of the Corps’ position that the “adjacent’ waters 401 WQC condition discussed above acceptable. This administrative denial determination for the 401 WQC with conditions for NWP 12, 29, 39, 44, 57 and 58 is consistent with the following statement in SCDHEC’s December 14, 2020, WQC/CZC letter:

“The Department expects the conditions requested below to be included in the final regional conditions of the Nationwide Permits. If not included, the Department does not have reasonable assurance that the work authorized by the Nationwide Permits will be conducted in a manner consistent with the certification requirements of Section 401 of the CWA, as amended, or the Coastal Tidelands and Wetlands Act (S.C. Code of Laws §48-39-10 et.seq.) and SC Coastal Zone Management Program and the certifications are denied for these Nationwide Permits.”

Therefore, anyone wanting to perform activities under NWP 12, 29, 39, 44, 57 and 58 must first obtain an individual 401 WQC or waiver.

Please see the enclosed public notice that was issued on February 3, 2021, by the Charleston District announcing the Clean Water Act Section 401 Certification Rule. This public notice may also be found on the Charleston District’s website at <https://www.sac.usace.army.mil/Missions/Regulatory/Public-Notices/Article-View/Article/2491488/special-public-notice-clean-water-act-section-401-certification-rule/>.

C. 401 WQC Issued Without Conditions

As stated above, SCDHEC granted the 401 WQCs without conditions for NWP 40, 42 and 48. Therefore, the Corps will rely on the general 401 WQCs for NWP 40, 42 and 48, and issue authorizations for the discharges into waters of the United States for NWP 40, 42 and 48.

Part II: Coastal Zone Consistency (CZC)

The South Carolina Department of Health and Environmental Control (SCDHEC) issued a Notice of Department Decision dated November 25, 2020, followed by 401 WQC decisions and the Coastal Zone Management Consistency (CZC) decisions in a letter dated December 14, 2020. Specifically, SCDHEC: (1) disagreed with the Corps' CZC determinations, resulting in a denial of CZC for NWP 21, 50, 55 and 56; (2) concurred with the Corps' CZC determinations without conditions for NWP 40 and 48; and (3) concurred with the Corps' CZC determinations with conditions for NWP 12, 29, 39, 42, 43, 44, 51, 52, 57 and 58.

Enclosed with today's public notice the "2021 Nationwide Permits, Water Quality Certifications, Coastal Zone Consistent Determinations and Direct Critical Area Permits Table and Guide" that assists with determining WQC and/or CZC requirements for each of the 57 NWPs.

A. CZC Denial

In accordance with the Corps' regulations at 33 CFR § 330.4(d), and as a result of the SCDHEC's disagreement with Corps' CZC determinations for certain activities authorized by NWP 21, 50, 55 and 56 in State of South Carolina, the Corps has denied authorization for those activities without prejudice until the certifying authority issues an individual CZC concurrence or concurrence can be presumed. Anyone wanting to perform activities under NWP 21, 50, 55 and 56 must first obtain an individual CZC concurrence or demonstrate that concurrence should be presumed.

B. CZC Concurrence With Conditions

1. NWP 43 and 52

The Charleston District has reviewed SCDHEC's CZC concurrence with conditions for NWP 12, 29, 39, 42, 43, 44, 51, 52, 57 and 58 and has determined that the following CZC conditions for NWP 43 and 52 are acceptable in accordance with 33 CFR § 330.4(d), comply with the provisions of 33 CFR § 325.4, and will be included as Regional Conditions:

For NWP 43:

"Activities authorized by this certification are limited to maintenance of existing facilities, such as stormwater ponds, detention and retention basins, water control structures, outfall structures, emergency spillways, and existing ponds that are proposed for use as water quantity or volume control. This NWP cannot be used for existing ponds that are proposed to be converted into water quality treatment facilities such as sediment basins, sediment traps, or other similar structures."

For NWP 52:

“This NWP is not certified for activities that cause the loss of more than 300 linear feet of stream bed.”

Therefore, the Corps will rely on the general CZC concurrence for NWPs 43 and 52 and issue authorizations for the activities in waters of the United States for NWPs 43 and 52.

The above conditions can be found on Section F of the enclosed “FINAL REGIONAL CONDITIONS FOR 16 NATIONWIDE PERMITS IN CHARLESTON DISTRICT (SAC).”

2. “Adjacent” Waters CZC Condition

With regard to NWPs 12, 29, 39, 44, 57 and 58, SCDHEC included the following CZC condition:

“This NWP is not certified for activities located in or adjacent to (as determined by SCDHEC) waters defined (as per Regulation 61-68) as Outstanding National Resource Waters (ONRW), Outstanding Resource Waters (ORW), or Trout Waters.”

The Corps has determined that the “adjacent” waters CZC condition is unacceptable in accordance with 33 CFR § 330.4(d)(2) and (3) and does not comply with the provisions of 33 CFR § 325.4. This condition would require the Corps to search the SCDHEC website or other available information provided and/or managed by SCDHEC to determine which waters in the State of South Carolina are considered ONRWs, ORWs or Trout Waters. Additionally, this condition requires either the Corps to make an “adjacency” determination on behalf of SCDHEC or requires SCDHEC to make the “adjacency” determination during the Corps’ review of PCNs. The Corps views this condition as problematic because the Corps may have a different definition of “adjacency” than SCDHEC, and because making an adjacency determination for SCDHEC is not within the regulatory authority of the Corps. Furthermore, if SCDHEC is to make the “adjacency” determination during the PCN review, then this condition would grant SCDHEC an opportunity for a second CZC consistency review of projects under NWPs 12, 29, 39, 44, 57 and 58. For the reasons described herein, this CZC condition will not be included as a RC and consequently, this results in a denial without prejudice of activities under NWPs 12, 29, 39, 44, 57 and 58.

3. “Wetland Preservation” CZC Condition

With regard to NWPs 29, 39, 42 and 51, SCDHEC included the following CZC condition:

“For all projects, the applicant must provide a Wetland Master Plan consistent with the policies and procedures of Chapter III Policy Section XII E. of the S.C. Coastal Zone Management Program. WMP policies also

include the preservation of all wetlands not proposed to be impacted through approved restrictive covenants. The plan must include an identification of all wetlands, all wetland impacts/activities, drainage patterns, conceptual development, and a mitigation plan.”

The Corps has determined that this “wetland preservation” CZC condition is unacceptable in accordance with 33 CFR § 330.4(d)(2) and (3) and does not comply with the provisions of 33 § CFR 325.4. This condition requires the prospective permittee to preserve all wetlands not impacted through approved restrictive covenants. The Corps views this condition as problematic for several reasons. The first reason is that a Wetland Master Plan be provided that is consistent with Chapter III Policy Section XII E. of the S.C. Coastal Zone Management Program, which is a State program not administered by the Corps. Additionally, the Corps would not otherwise require that a prospective permittee preserve the remaining wetlands. Therefore, this CZC condition was determined to be unacceptable on that basis alone. Second, the Corps cannot legally require a prospective permittee to preserve all remaining wetlands onsite. The condition indicates that the preservation would be required regardless of whether compensatory mitigation for the authorized impacts is required. Third, if authorized impacts require compensatory mitigation, a compensatory mitigation plan must comply with the 2008 Mitigation Rule (2008 Mitigation Rule) and the Charleston District’s Guidelines for Preparing a Compensatory Mitigation Plan (Charleston District Guidelines). The 2008 Mitigation Rule (33 CFR Part 332) specifically identifies an order by which mitigation should follow with the purchase of mitigation bank credits being the preferred option, followed by in-lieu fee program credits, permittee-responsible mitigation under a watershed approach, permittee-responsible mitigation through on-site and in-kind mitigation, and then permittee-responsible mitigation through off-site and/or out-of-kind mitigation. With regard to preservation, 33 CFR § 332.3(h) states as follows:

“preservation may be used to provide compensatory mitigation for activities authorized by DA permits when all the following criteria are met: (1) Preservation may be used to provide compensatory mitigation for activities authorized by DA permits when all the following criteria are met: (i) The resources to be preserved provide important physical, chemical, or biological functions for the watershed; (ii) The resources to be preserved contribute significantly to the ecological sustainability of the watershed. In determining the contribution of those resources to the ecological sustainability of the watershed, the district engineer must use appropriate quantitative assessment tools, where available; (iii) Preservation is determined by the district engineer to be appropriate and practicable; (iv) The resources are under threat of destruction or adverse modifications; and (v) The preserved site will be permanently protected through an appropriate real estate or other legal instrument (e.g., easement, title transfer to state resource agency or land trust). (2) Where preservation is used to provide compensatory mitigation, to the extent appropriate and practicable the preservation shall be done in conjunction with aquatic resource restoration, establishment, and/or enhancement activities. This

requirement may be waived by the district engineer where preservation has been identified as a high priority using a watershed approach described in paragraph (c) of this section, but compensation ratios shall be higher.”

Additionally, Charleston District Guidelines provide an option for prospective permittees and applicants to receive a 25% reduction in the amount of required mitigation credits, if the wetlands to be preserved meet certain criteria described in the Guidelines. If the prospective permittee or applicant choose not to preserve the remaining wetlands or the remaining wetlands do not qualify for the 25% reduction in the amount of required credits, the prospective permittee or applicant may purchase the full amount of required credits from a mitigation bank or propose alternative mitigation. Therefore, this CZC condition was also determined to be inconsistent with the 2008 Mitigation Rule (33 CFR Part 332). Lastly, the CZC condition requires that the remaining wetlands be preserved through “approved restrictive covenants” and that the Wetland Master Plan “include an identification of all wetlands, all wetland impacts/activities, drainage patterns, conceptual development, and a mitigation plan.” The Corps would not otherwise require this information; therefore, this CZC condition was determined to be unacceptable on this basis. Additionally, the condition requires that the Corps review this information on behalf of SCDHEC OCRM or requires that SCDHEC OCRM review the Wetland Master Plan during the Corps’ review of PCNs. The Corps would not otherwise require this information. For the reasons described herein, this CZC condition will not be included as a regional condition and consequently, this results in a denial without prejudice of NWP 29, 39, 42 and 51 activities and an individual CZC concurrence is required. However, in accordance with 33 CFR § 330.4(d)(6), “upon receipt of an individual consistency concurrence or upon presumed consistency, the proposed work is authorized if it complies with all terms and conditions of the NWP.”

4. NWPs 29 and 39

While the remaining CZC conditions for NWPs 29 and 39 were otherwise acceptable in accordance with 33 CFR § 330.4(d) and comply with the provisions of 33 CFR § 325.4, these conditions will also not be added as regional conditions because the CZC with conditions for NWPs 29 and 39 are administratively denied as a result of the Corps’ position that the “adjacent” waters CZC condition and “wetland preservation” CZC condition discussed above are both unacceptable.

5. NWPs 12, 44, 57 and 58

While the remaining CZC conditions for NWPs 12, 44, 57 and 58 were otherwise acceptable in accordance with 33 CFR § 330.4(d) and comply with the provisions of 33 CFR § 325.4, these conditions will also not be added as regional conditions because the CZC with conditions for NWPs 12, 44, 57 and 58 are administratively denied as a result of the Corps’ position that the “adjacent” waters CZC condition discussed above is unacceptable.

6. NWP 42 and 51

While the remaining CZC conditions for NWP 42 and 51 were otherwise acceptable in accordance with 33 CFR § 330.4(d) and comply with the provisions of 33 CFR § 325.4, these conditions will also not be added as regional conditions because the CZC with conditions for NWP 42 and 51 are administratively denied as a result of the Corps' position that the "wetland preservation" CZC condition discussed above is unacceptable.

The above administrative denial determinations for the CZC with conditions for NWP 12, 29, 39, 42, 44, 51, 57 and 58 are consistent with the following statement in SCDHEC's December 14, 2020, WQC / CZC letter:

"The Department expects the conditions requested below to be included in the final regional conditions of the Nationwide Permits. If not included, the Department does not have reasonable assurance that the work authorized by the Nationwide Permits will be conducted in a manner consistent with the certification requirements of Section 401 of the CWA, as amended, or the Coastal Tidelands and Wetlands Act (S.C. Code of Laws §48-39-10 et.seq.) and SC Coastal Zone Management Program and the certifications are denied for these Nationwide Permits."

Therefore, anyone wanting to perform activities under NWP 12, 29, 39, 42, 44, 51, 57 and 58 must first obtain an individual CZC concurrence or demonstrate that concurrence should be presumed.

C. CZC Issued Without Conditions

As stated above, SCDHEC concurred with the Corps' CZC determinations without conditions for NWP 40 and 48. Therefore, the Corps will rely on the general CZC concurrence for NWP 40 and 48, and issue authorizations for the activities in waters of the United States for NWP 40 and 48.

D. CZC General Condition

SCDHEC's December 14, 2020, WQC / CZC letter provides the following CZC General Condition:

"Activities in the Critical Areas (as defined in 48-39-10, R 30.1(D) and R 30.10) require a direct permit from SCDHEC OCRM [South Carolina Department of Health and Environmental Control – Office of Ocean and Coastal Resource Management]. SCDHEC OCRM's action on direct critical area permits will serve as the consistency determination for the critical area activity."

The Charleston District has determined that the CZC General Condition is acceptable in

accordance with 33 CFR § 330.4(d), complies with the provisions of 33 CFR § 325.4, and will be included as Regional Condition.

This condition can be found on Section F of the enclosed "FINAL REGIONAL CONDITIONS FOR 16 NATIONWIDE PERMITS IN CHARLESTON DISTRICT (SAC)."