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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 26, 2007

Ms. Denise Sloan
U.S. Army Corps of Engineers
Galveston District CESWG-PE-RE
P.O. Box 1229
Galveston, Texas 77553-1229

Re: USACE Nationwide Permits

Dear Ms. Sloan:

This letter is in response to your April 3, 2007, letter requesting Clean Water Act Section 401 certification of the United States Army Corps of Engineers (Corps) Nationwide Permits (NWP). The Final Notice of Reissuance of Nationwide Permits was published in the Federal Register (Part II, Vol. 72, No. 47, pages 11092-11198) on March 12, 2007. Proposed regional conditions for NWPs in Texas were proposed in an October 12, 2006 public notice.

The Texas Commission on Environmental Quality (TCEQ) has reviewed the Final Notice of Reissuance of Nationwide Permits and the proposed regional conditions. On behalf of the Executive Director and based on our evaluation of the information contained in these documents, the TCEQ certifies that the activities authorized by NWPs 1, 2, 4, 5, 8, 9, 10, 11, 20, 23, 24, 28, 34, 35, and 48 should not result in a violation of established Texas Surface Water Quality Standards as required by Section 401 of the Federal Clean Water Act and pursuant to Title 30, Texas Administrative Code, Chapter 279.

The TCEQ conditionally certifies that the activities authorized by NWPs 3, 6, 7, 12, 13, 14, 15, 17, 18, 19, 21, 22, 25, 27, 29, 30, 31, 32, 33, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, and 50 should not result in a violation of established Texas Surface Water Quality Standards as required by Section 401 of the Federal Clean Water Act and pursuant to Title 30, Texas Administrative Code, Chapter 279. Conditions for each NWP are defined in Enclosure 1 and more detail on specific conditions are discussed below.

The TCEQ understands that a prohibition against the use of NWPs in coastal dune swales will be included in the 2007 Texas Regional Conditions (Regional Conditions) for certain NWPs consistent with the 2002 Texas Regional Conditions. Inclusion of a prohibition of using NWPs in coastal dune swales is a condition of this 401 TCEQ certification.

The prohibition of sidecasting of materials was removed from NWP 41 in the 2007 NWP renewal. In the November 28, 2006 TCEQ comment letter to the Corps regarding the Regional Conditions for NWP 41, the TCEQ requested the prohibition against the permanent sidecasting of excavated materials into waters of the

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U.S. be included as a regional condition. The TCEQ recommended that if the sidecasting prohibition is not included in the Regional Conditions, that a limit on the amount of waters of the U.S. that can be impacted by the sidecasting, and a requirement for mitigation of those impacts be included as a regional condition. If the Corps chooses to not include a prohibition against sidecasting material in the Regional Conditions, the TCEQ conditional certification of NWP 41 is that the area impacted by the sidecasting should not exceed 3 acres or 1500 linear feet. For purposes of calculating the threshold one acre of impact is considered equal to 500 linear feet. Inclusion of a prohibition against the permanent sidecasting of material that impacts more than 3 acres or 1500 linear feet under NWP 41 is a condition of this 401 TCEQ certification.

In the November 28, 2006 TCEQ comment letter to the Corps regarding the Regional Conditions for NWP 46 (previously NWP B), the TCEQ requested a regional condition for NWP 46 that contains an upper limit no greater than 1,500 linear feet. Inclusion of a limit no greater than 1,500 linear feet under NWP 46 is a condition of this 401 TCEQ certification.

The TCEQ wants to clarify the application of NWP 16 in Texas. NWP 16 should be limited to the return water from upland contained dredged material disposal areas. It is important to emphasize the intent for dredged material disposal. The TCEQ understands dredged material to be associated with navigational dredging activities, not commercial mining activities. To avoid confusion the TCEQ requests that a regional condition be added that prohibits the use of NWP 16 for activities that would be regulated under Standard Industrial Classification (SIC) codes 1442 and 1446 (industrial and construction sand and gravel mining). This condition is also included as part of the 401 certification of NWP 16.

The final NWP 16 states that the quality of the return water is controlled by the state through the 401 certification procedures. Consistent with previous NWPs certification decisions the TCEQ is conditionally certifying NWP 16 for the return water from confined upland disposal not to exceed a 300 mg/L Total Suspended Solids (TSS) concentration and request the Corps to include this condition in the Regional Conditions. The TCEQ recognizes the usefulness of having an instantaneous method to determine compliance with the 300 mg/L TSS limit. However, existing literature and analysis of paired samples of turbidity and TSS from the Texas Surface Water Quality Data indicate this relationship must be a site specific characterization of the actual sediments to be dredged. To address this approach we have included new language in the NWP 16 conditional certification that allows flexibility to use an instantaneous method in implementing the TSS limit when a site specific correlation curve for turbidity (nephelometric turbidity units (NTU)) versus TSS has been approved by TCEQ. The TCEQ remains interested in working with the Corps in the development of these curves. We encourage the Corps to accept the conditional certification of NWP 16 as a Regional Condition and that we work together to find the best methods to implement this limit.

In evaluating this condition for the Regional Conditions for NWPs the TCEQ encourages the Corps to consider that TSS limits are promulgated as effluent limits under Title 40 of the Code of Federal Regulations. The TCEQ requirement to control return water from confined upland disposal not to exceed a 300 mg/L TSS has also been included in individual 404 permits. It is also important to note that the TCEQ effectively imposes

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TSS effluent limits in thousands of wastewater discharge permits issued in Texas under Section 402 of the federal Clean Water Act.

The TCEQ is conditionally certifying NWP General Condition #12 *Soil Erosion and Sediment Controls*, and General Condition #21 *Water Quality*. The conditions address three broad categories of water quality management with specific recommendations for Best Management Practices (BMPs) for each category. These BMPs are intended to enhance the water quality protection of these General Conditions. A list of TCEQ-recommended BMPs is included as Enclosure 2. Enclosure 3 is provided as a quick reference for all NWPs. A detailed description of the BMPs is provided in Enclosure 4. Runoff from bridge decks has been exempted from the requirement for post-construction total suspended solids (TSS) controls under General Condition 21. As stated in our April 3, 2007 letter to the Corps, the TCEQ would like to include these BMPs for the protection of waters in the state specific to each NWP as part of the regional conditions for Texas.

The TCEQ is conditionally certifying NWPs 13, 29, 39, 40, 41, 42, 43 to require the Corps to copy TCEQ on all written approvals of waivers for impacts to ephemeral, intermittent or perennial streams. The TCEQ is conditionally certifying NWP 36 to require the Corps to copy TCEQ on all written waivers for discharges greater than the 50 cubic yard limit or boat ramps greater than 20 feet in width. The TCEQ is also conditionally certifying General Condition 20 *Mitigation* to require the Corps to copy TCEQ on any written notification of a mitigation waiver. In addition, TCEQ understands that a regional condition will be added that requires mitigation for streams and special aquatic sites, such as pools/riffles, seagrass, and mudflats that will adequately compensate for their functions and values. The TCEQ is requesting this information to fulfill its responsibility to ensure water of the state is appropriately protected by understanding the impact of waivers being granted in Texas.

This certification decision is limited to those activities under the jurisdiction of the TCEQ. For activities related to the production and exploration of oil and gas a Texas Railroad Commission certification is required as provided in the Texas Water Code §26.131.

The TCEQ has reviewed the Notice of Reissuance of Nationwide Permits for consistency with the goals and policies of the Texas Coastal Management Program (CMP) in accordance with the regulations of the Coastal Coordination Council, 31 TAC §505.30, and has determined that the action is consistent with the applicable CMP goals and policies.

This certification was reviewed for consistency with the CMP's development in critical areas policy {31 TAC §501.14(h)} and dredging and dredged material disposal and placement policy {31 TAC §501.14(j)}. This certification complies with the CMP goals {31 TAC §501.12(1,2,3,5)} applicable to these policies.

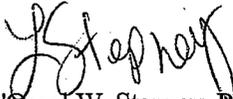
The TCEQ reserves the right to modify this certification if additional information identifies specific areas where significant impacts, including cumulative or secondary impacts, are occurring, and the use of these NWPs would be inappropriate.

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No review of property rights, location of property lines, nor the distinction between public and private ownership has been made, and this certification may not be used in any way with regard to questions of ownership.

If you require further assistance, please contact Ms. Lori Hamilton, Water Quality Assessment Section, Water Quality Division (MC-150), at (512) 239-0683.

Sincerely,



L'Oréal W. Stepney, P.E., Director
Water Quality Division
Texas Commission on Environmental Quality

LWS/LH/jp
Enclosures

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