Public Notice

U.S. Army Corps
of Engineers
Baltimore District

Special Public Notice #16- 47

Date: August 11, 2016

Subject: Reinstatement of 2012 Nationwide Permit #48 Authorizing New and Existing Commercial Shellfish Aquaculture Activities in Maryland

The purpose of this special public notice is to inform the general public of the Baltimore District, U.S. Army Corps of Engineers (Corps) decision to reinstate the suspended 2012 Nationwide Permit #48 (NWP #48) with revised regional conditions for new and existing commercial shellfish aquaculture activities in Maryland tidal waters. NWP #48 will replace the expiring Regional General Permit-1 (RGP-1) for commercial aquaculture activities. An enclosure to this public notice (Enclosure 1) lists the revised regional conditions applicable to NWP #48 activities in Maryland waters. The reinstated 2012 NWP #48 with revised regional conditions will become effective in Maryland waters on August 16, 2016.

Background:

On August 15, 2011, the Corps issued a Regional General Permit (RGP-1) for new commercial, research, and educational bivalve shellfish aquaculture activities in tidal navigable waters of the United States within the State of Maryland. The RGP-1 provided a streamlined form of Department of the Army (DA) authorization for new native oyster aquaculture activities that were expanding as a result of changes in State laws. The RGP-1 was issued for a five year period and expires on August 15, 2016.

On April 28, 2016, the Corps issued Special Public Notice (SPN) #16-25 proposing to reinstate the currently suspended 2012 NWP #48 with revised regional conditions, in accordance with Corps regulations at 33 C.F.R. § 330.1(d), 330.4(e), and 330.5. The reinstated NWP #48 will be effective from August 16, 2016 to the expiration of the 2012 NWPs on March 18, 2017. The reinstatement of the 2012 NWP #48 will authorize new and existing commercial shellfish aquaculture activities within Maryland waters pursuant to Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act.

Prior Corps Authorizations for Aquaculture

Aquaculture operations typically involve removing and replacing structures and/or performing work, such as the deposition of shell (with or without oyster spat) on bottom, within navigable waters of the United States on an on-going basis. These aquaculture activities must maintain a valid DA permit for the duration of the on-going work.

Written project-specific authorizations from the Corps (i.e., Individual Permit (IP), RGP-1, and NWP #48) for on-going aquaculture activities continue to be valid for a specific period subject to the terms and conditions of that project-specific DA authorization. After expiration of the Corps authorization, the permittee must receive a new authorization from the Corps for on-going or new aquaculture activities under the terms and conditions of the

NWP #48 that is in effect at the time of expiration or seek authorization under the IP process. If you wish to continue with the operation of an approved aquaculture activity beyond the expiration date, you must notify the Corps, in writing, of your intentions at least 90 days prior to the expiration date to allow sufficient time for Corps review and determination regarding required authorizations.

All aquaculture activities that have received prior written project-specific authorization from the Corps under the RGP-1, and where the authorized work was initiated or under contract to commence by August 15, 2016, will continue to be authorized until August 15, 2017 under the terms and conditions of the RGP-1. After the grandfather period ending August 15, 2017, on-going aquaculture activities previously verified under the RGP-1 must obtain a new DA authorization under the terms and conditions of the 2017 NWP #48 or an IP. We will issue a public notice when the NWPs are reissued.

Aquaculture activities that have received written, project-specific RGP-1 verification and do not start work or get under contract by August 15, 2016 are no longer valid and must obtain a new Corps authorization under the terms and conditions of the reinstated 2012 NWP #48, or an individual permit, as appropriate, before initiating the aquaculture work.

A permittee must either seek a new DA authorization under the IP process or revise their project to meet the terms and conditions of the NWP #48 when a previously authorized shellfish aquaculture project does not comply with the terms and conditions of the 2012 NWP #48. The new DA authorization will allow for the continued operation and authorization of the aquaculture project (removing and replacing structures and/or performing work, such as the deposition of shell (with or without oyster spat) on bottom, subject to the terms and conditions of the new DA permit (i.e., IP or NWP #48). Aquaculture projects that do not obtain a valid DA permit will no longer be authorized by the Corps.

Comments received

In response to SPN 16-25, the Corps received comments recommending retention of the aquaculture acreage limits specified in the current 2012 NWP regional conditions and as provided by RGP-1 (50 acres for shell on bottom, 5 acres of cages on the bottom, and 3 acres of floating aquaculture structures). These comments cited concerns that the size of some individual aquaculture operations may have adverse impacts on local water quality, aquatic resources, and natural sedimentation processes. One commenter expressed concern that without acreage thresholds, a few single large aquaculture companies could dominate the remaining available leasing acreage and reduce aquaculture opportunities for more entrepreneurs. Another commenter requested a public hearing citing concerns regarding aquaculture project reviews by the Corps going forward under NWP #48.

Comments were received in support of the proposal to eliminate the current acreage thresholds and reinstatement of NWP #48. In addition, a commenter stated that aquaculture permit reviews in Maryland waters should mirror the aquaculture permit review processes as are done in Virginia.

Concerns were expressed regarding screening of applications with respect to avoidance of areas supporting submerged aquatic vegetation (SAV), and raised questions regarding the quality and resolution of the aerial imagery that would be used for such screening. Other

comments stated that the public trust doctrine needed to be considered during aquaculture reviews; that sterile oysters do not benefit the natural oyster population; that the proposal would lead to the end of the public fishing industry; and that leases should not be located on public bottom that is being worked or that is being used for wild fisheries.

Questions were received regarding the reasons for suspending NWP #48, whether adjacent property owners would be notified of proposed aquaculture applications, how the NWP #48 would compare to the RGP-1 process, and how on-going projects or those currently under review would be affected by reinstatement of the 2012 NWP #48.

The National Marine Fisheries Service, Habitat Conservation Division (NMFS HCD) expressed no concerns with removing the current acreage thresholds of the 2012 NWP #48 Regional Conditions. The Environmental Protection Agency (EPA) stated that they had no comments. The National Marine Fisheries Service, Protected Resources Division (NMFS PRD) provided comments on Endangered Species Act (ESA) consultation. The Corps has initiated informal programmatic Section 7 ESA consultation with the NMFS PRD. If this consultation is not completed prior to the effective date of the 2012 NWP #48 reinstatement on August 16, 2016, the Corps will consult, as necessary on a case-by-case basis with the NMFS PRD in accordance with the 2012 NWP general condition 18, Endangered Species.

Decision

The Corps has considered all comments received in response to this SPN, along with information gained from our experience reviewing aquaculture activities over the past five years. After factoring in all of this information, the Corps has decided to reinstate the 2012 NWP #48 authorizing new and existing commercial shellfish aquaculture activities without acreage thresholds within Maryland waters pursuant to both Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. In addition, several changes are being made to the District's aquaculture permit review processes.

This decision to reinstate the 2012 NWP #48 will allow the Corps to consider applications for new and existing commercial shellfish aquaculture activities within the State of Maryland that meet the revised regional conditions, all terms and eligibility criteria, limitations, and conditions specified in the NWP #48. In order for the NWP #48 to be valid for a particular activity, a person or entity seeking verification under the NWP #48 must obtain all other Federal, state and/or local authorizations required by law prior to commencement of such work in waters of the U.S. Activities that do not comply with the provisions of the NWP #48 will require alternate DA authorization (i.e., IP).

The Corps has decided to make changes to the current federal aquaculture review process to enable the District to receive the applications within 7 to 10 workdays from the Maryland Department of Natural Resources (MDNR) receipt date. The District has also decided to require additional information to be submitted in the application package to ensure that the proposed activities will have minimal individual and cumulative impacts on the aquatic environment, navigation, endangered species, the overall public interest, and other relevant factors.

The Corps has also decided to eliminate the exclusion lines shown by the map attached to the SPN rather than limit the utility of NWP #48 based on the imprecise designations shown by this mapping. The Corps shall use MDNR's anadromous fish spawning data layers, in the most current form that exists, during the PCN review, to ensure that any commercial aquaculture proposals are not located within any mapped anadromous fish spawning areas. In addition, the Corps will provide to NMFS HCD and PRD copies of all commercial aquaculture applications that are received, as required by our revised regional conditions.

In consideration of the requests for a public hearing, the Corps has determined, given the scope and detail of the comments provided in response to SPN 16-25, and based upon information that has been received, that there is no need to convene a public hearing to assist the Corps in making the decision whether to reinstate the suspended 2012 NWP #48 with revised regional conditions for new commercial aquaculture in Maryland waters since no additional information is needed to assist the Corps in making a decision on the reinstatement of NWP #48. Accordingly, the District has denied these requests.

The regional conditions for existing commercial aquaculture activities covered under the 2012 NWP #48 in Pennsylvania, the District of Columbia, and military installations of northern Virginia remain unchanged as published in the District's Special Public Notice, #12-32 dated March 19, 2012 located at: http://www.nab.usace.army.mil/Missions/Regulatory/Public-Notices/Article/492646/spn-12-32-reissuance-of-nationwide-permits/.

The 2012 Nationwide Permits, the February 21, 2012 Federal Register, and the notice of corrections are available on the Corps home page at: http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/

Coastal Zone Management Act (CZMA) Consistency Determination and Clean Water Act Section 401 Water Quality Certification (WQC): The revised regional conditions for the reinstated 2012 NWP #48 issued herein will become effective on August 16, 2016. The Maryland Department of the Environment (MDE) is expected to issue a WQC and a determination regarding CZMA consistency. Accordingly, conditions from MDE regarding either CZMA consistency or WQC will be applicable to all authorizations issued by the Corps under NWP #48. If MDE does not complete their CZMA consistency or WQC determinations by August 16, 2016, each 2012 NWP #48 verification will require that an individual State CZMA consistency concurrence or WQC be obtained or waived.

Copies of this public notice may also be found on the Baltimore District Regulatory website at: http://www.nab.usace.army.mil/Missions/Regulatory/PublicNotices.aspx

Information, including Q's and A's, regarding aquaculture is located at: http://www.nab.usace.army.mil/Missions/Regulatory/Aquaculture.aspx

Information on Maryland shellfish aquaculture is located at: http://dnr2.maryland.gov/fisheries/Pages/aquaculture/shellfish.aspx

If you have any questions or need additional information, please contact Mr. Woody Francis, Regulatory Program Manager, U.S. Army Corps of Engineers, Baltimore District,

Regulatory Branch, 10 South Howard Street, Baltimore, Maryland 21201, 410-962-5689 or email at woody.francis@usace.army.mil.

FOR THE DISTRICT ENGINEER:

Beth E. Bachur

BETH E. BACHUR
Acting Chief, Regulatory Branch

Enclosure 1
Revised Regional Conditions Applicable to NWP #48, Effective August 16, 2016.

The existing regional conditions for NWP #48 activities in Pennsylvania, the District of Columbia, and military installations of northern Virginia remain in place.

Nationwide Permit #48 *Commercial Shellfish Aquaculture Activities* - Regional Conditions (Applicable in Maryland)

1. **This NWP does not authorize the following activities:**

   a. Activities located in any areas mapped as submerged aquatic vegetation. In the Baltimore District, the applicant may refer to the Virginia Institute of Marine Science aerial surveys for obtaining such information. http://web.vims.edu/bio/sav/index.html

   b. Activities associated with the cultivation and/or introduction into tidal waters of shellfish species that are not indigenous to the Chesapeake Bay and its tributaries, the Maryland coastal bays; or

   c. Activities associated with the mining of subtidal fossil shell deposits in waters of the Chesapeake Bay and its tributaries for use as cultch for a shellfish cultivation operation.

   d. Activities that cause interference with navigation. No work may extend into anchorage areas; customary boating channels; navigation fairways; marked, unmarked, lighted, charted or unchartered channels; or private, State, or Federal Navigation Channels.

   e. Activities that adversely affect ingress to and egress from neighboring properties.

   f. Commercial aquaculture activities for crustaceans or finfish.

   g. Shellfish habitat restoration activities, including shellfish seeding that are conducted to restore populations of shellfish in navigable waters of the United States. Shellfish habitat restoration activities may be authorized by another form of Department of the Army permit (e.g., Nationwide Permit #27 or individual permit).

   h. Activity or vehicular access to the project site that have more than a minimal adverse impact on coastal or wetland vegetation.

   i. Oyster gardening activities.

   j. The establishment of Aquaculture Enterprise Zones or preapproved areas of the Atlantic Coastal Bays.

k. Predator control devices (i.e., mesh fences, mesh nets, mesh tents) suspended or erected vertically or obliquely in the water column to surround or enclose shellfish containment gear.

l. Existing or proposed activities associated with an ongoing Corps or Environmental Protection Agency enforcement action until such time as the enforcement action is resolved, or the Corps determines that the activity may proceed independently without compromising the enforcement action.

m. Activities that have more than minimal individual and/or cumulative adverse impact.

n. Activities that use unsuitable materials for shellfish seeding (i.e., asphalt, bituminous concrete, slag, tires, wallboard, plastic, wood, metal, crushed glass, trash, and garbage).

o. Activities that will have more than minimal adverse effects on existing or naturally occurring beds or populations of shellfish, marine worms, or other invertebrates that could be used by man, other mammals, birds, reptiles, or predatory fish.

p. Activities that result in the physical destruction, substantial turbidity or sedimentation, (e.g., through excavation, dredging, and/or filling) of an important spawning/nursery habitat are not authorized by this permit.

2. **Shellfish Certification:** Shellfish introduced into tidal waters of the Chesapeake Bay and its tributaries, or in the Maryland coastal bays and their tributaries, must be certified (under Maryland standards) as being disease and parasite free.

3. **Vertical and Horizontal Lines:** The total number of vertical and horizontal lines must be minimized to the maximum extent practicable.

4. **Private Aids to Navigation:** If the Corps or the U.S. Coast Guard determine that private aids to navigation are required to mark the project area, **the permittee must prepare and provide for United States Coast Guard (USCG) approval (address below), a Private Aids to Navigation Application (CG-2554) prior to commencement of the authorized work.** The form can be found at this link: http://www.uscg.mil/forms/cg/CG_2554.pdf.

Commander (dpw)
Fifth Coast Guard District
431 Crawford Street, Room 100
Portsmouth, VA. 23704-5504
Attn.: Private Aids to Navigation
Email address: CGD5Waterways@uscg.mill
Fax Number: (757) 398-6303

The permittee must provide the Corps with a copy of the USCG's approval of aids to navigation within 30 days of the date of issuance by the USCG.

5. **Local Notice to Mariners:** **Prior to the proposed project start/placement date, the permittee must provide coordinates (latitude and longitude) for all perimeter corners of the approved lease area, including minimum depth and other pertinent facility information to the USCG, and request that a Local Notice to Mariners (LNM) be issued regarding the authorized work.** This written request can be done either by e-mail, letter or fax to:

   Commander (dpw)
   Fifth Coast Guard District
   431 Crawford Street, Room 100
   Portsmouth, VA. 23704-5504
   Attn.: LNM
   Email address: CGD5Waterways@uscg.mill
   Fax Number: (757) 398-6303

   No authorized work may commence until this required USCG LNM has been issued by the USCG, identifying the location and schedule for commencement of the approved aquaculture work.

   No authorized aquaculture work may commence until the permittee informs the Corps in writing, with the date that the USCG publishes the LNM.

6. **Navigation Charts:** The permittee must submit a copy of the Corps permit and plans for the aquaculture operation to the National Oceanic and Atmospheric Administration (NOAA) for charting the location of the authorized operation on navigation charts. Their address is NOAA-Marine Chart Division, Nautical Data Branch-N/CS26, 1315 East West Highway-Station 7350, Silver Spring, MD 20910-3282.

7. **Equipment Anchoring and Lease Marking:** The permittee must maintain the work authorized herein, including aids to navigation, in good condition and in conformance with the terms and conditions of this permit.

   All authorized equipment, gear, and manmade material must be securely anchored. The permittee must clearly and permanently mark all in-water structures and equipment with the permittee's name and the lease number issued by the DNR. These markings must be maintained to ensure that they are readable and visible at all times for identification purposes.

8. **Permittee Inspection of Aquaculture Operation:** The permittee must regularly inspect the condition of the structures (e.g., floats, cages, lines, anchors, etc.) associated with this aquaculture operation as authorized herein, to ensure that any structures/gear do not affect safety on the waterway or interfere with general navigation.

   Within 48 hours after a substantial storm event (e.g. nor'easter, tropical storm, hurricane), the permittee must visually inspect the aquaculture operation and aids to navigation to assess any storm damaged structures and/or equipment. Any damage

noted and the number of lost and/or unrecoverable gear/structures must be reported, in writing, to the Corps of Engineers within 48 hours of inspection.

The permittee is required to search for and retrieve any missing structures/gear (floats, cages, lines, anchors, aids to navigation, etc.) to ensure that any structures/gear (floats, cages, lines, anchors, aids to navigation, etc.) do not affect safety on the waterway or interfere with general navigation.

The permittee shall recover any authorized structures/gear or equipment including aids to navigation, dislodged by storms, wave action, boat wakes or other causes, that are found outside the approved permit area/lease boundaries as authorized, as soon as possible but within 10 days of being discovered. The permittee shall either restore the location of any such equipment within the permitted areas as authorized, or shall dispose of such equipment if structures/equipment are so damaged that they are no longer usable, in accordance with state and local ordinances and lease agreements issued by the State of Maryland.

The MD DNR is the appropriate agency to manage compliance with Submerged Land Lease/Aquaculture/Water Column Lease contract and derelict gear. MD DNR can be contacted at the following:

Maryland Department of Natural Resources
580 Taylor Avenue
Annapolis, Maryland 21401
1-877-620-8DNR (8367)
http://www.dnr.state.md.us

Wave Wash:

The permittee acknowledges the possibility that the structures permitted herein may be subject to damage by wave wash from passing vessels and/or ice flows within the waterway. The issuance of this permit does not relieve the permittee from taking all proper steps to insure the integrity and maintenance of the structures permitted herein from damage by wave wash and/or ice flows, and the permittee shall not hold the United States liable for any such damage.

Inspection by Corps of Engineers:

All permitted aquaculture projects are subject to inspection by the Corps for compliance with the provisions of this permit. The permittee assumes all liability for accomplishing any corrective work as directed by the Baltimore District, Corps of Engineers, to ensure compliance with the terms and conditions of the authorized work.

9. **Disposal of Structures, Gear, or Waste:** Disposal of structures, gear or waste products on-site or into waters of the United States is prohibited. All structures, gear and waste products, including dead or dying culture animals, shall be disposed of in an

approved upland disposal site in accordance with any Federal, State, and local regulations.

10. **Reporting:**

a. The permittee must maintain accurate records and submit an annual report covering the previous year's activities to the Corps before January 31 of each year. Annual reports must be submitted to: U.S. Army Corps of Engineers, Baltimore District (ATTN: Regulatory Branch), 10 South Howard Street, Baltimore, MD 21201; the National Marine Fisheries Service, Habitat Conservation Division, Chesapeake Bay Field Office, 177 Admiral Cochrane Drive, Annapolis, MD 21403; and the National Marine Fisheries Service, Protected Resource Division, 55 Great Republic Drive, Gloucester, MA 01930 and must include the following minimum information:

i. Name of permittee, Corps permit number, lease number, point of contact, phone number, and email address;
ii. The size of the total lease area (in acres);
iii. The following information must be included for each lease area:
    1) The location of areas within the lease area that were cultivated over the last year;
    2) Size of each cultivated area within the lease (in acres);
    3) Description of culture method(s) and harvesting method(s);
    4) Description of the type of material (e.g., spat-on-shell, shellfish shells, shell fragments, concrete fragments, or other approved materials) that was planted on the lease area.
    5) The total number of vertical, horizontal lines, buoys and other structures utilized on site.
    6) Identify the area in acres and the amount in cubic yards for each type of material (e.g., spat-on-shell, shellfish shells, shell fragments, concrete fragments, or other approved materials) that was planted on the lease area;
    7) Identify the date(s) (mm/dd/yy) that the authorized aquaculture equipment, gear, and/or suitable substrate was deployed;
    8) Name(s) of cultivated species;
    9) A statement regarding the presence or absence of submerged aquatic vegetation within the authorized lease area;
    10) A statement regarding any entanglements or interactions with Federally protected threatened and endangered species;
    11) A statement whether any temporary protective enclosures such as nets, etc. were used and a description of gear that was used;
    12) Information concerning storm damage, loss of equipment and recovery, including identification of the number and type of any structure/equipment/gear that were damaged, lost and/or were not recovered;
    13) Provide a signed statement that all perimeter markers are in place and that the work is being performed and maintained in accordance with the terms and conditions of the Corps' authorization.
    14) Provide the total amount (in acres) of hard bottom and soft bottom habitat utilized.

11. **Abandonment:** The permittee must provide the Baltimore District with thirty (30) day advance written notification of the intent to abandon the activity authorized under this NWP. Upon abandonment of the activity authorized by this permit, all structures and equipment used to support the aquaculture operation must be completely removed from the waterway and the entire area restored to pre-construction conditions to the satisfaction of the Baltimore District.

12. **Pre-Construction Notification to the Corps:**

The Joint State/Federal Application for a Commercial Shellfish Aquaculture Lease and Federal Permit (Joint Application) shall serve as the Pre-construction notification (PCN).

The prospective permittee must submit a PCN when:

a. The project does not have a valid authorization from the Corps in effect as of August 15, 2016.

b. The activity involves any change in aquaculture type (bottom culture; floating structures; or structures suspended in the water column) than what was previously authorized by the Corps.

The application is located at:
http://dnr2.maryland.gov/fisheries/Documents/Commercial-Shellfish-Lease-Application.pdf.

The instructions are located at:
http://dnr2.maryland.gov/fisheries/Documents/Shellfish-Lease-Application-Instructions.pdf

The Maryland Department of Natural Resources will forward the Joint Application to the Corps. Alternatively, the applicant may submit the application directly to the Corps. The Corps' review period shall commence with the receipt of a completed PCN at the Corps District Office.

13. In addition to the information required by NWP 48, the PCN must include:

i. A copy of the lease or permit issued by the appropriate state government agency if a lease or permit has been issued at the time of PCN submittal;

ii. Legible project vicinity map (black line on white background), to scale, and depicting the footprint of project area relative to prominent land/water geographic features, including approximate latitude/longitude coordinates of the project footprint;

iii. Legible overview plans (black line on white background), to scale (100':1", or 50':1"), depicting the entire project footprint and adjacent

waters overlaid on composite mapping of the 5 most recent years of submerged aquatic vegetation (SAV) data (derived from the Virginia Institute of Marine Science (VIMS) aerial surveys), and showing local water depths (bathymetry) of the project area, and other important ecological features of the site (e.g., native tidal marsh) that may be affected by project activities.

iv. Detailed project description, with the following information:

a) Description of proposed activities, including site preparation, harvest activities (e.g., dredging, harrowing and dragging of bottom substrate, tonging), and a description of how structures and vertical and horizontal lines would be arranged throughout the project area, spacing of rows and spacing between structures;

b) Types of aquaculture gear to be used, including anchoring devices, maximum number of vertical and horizontal lines, and buoys;

c) Acreage of project footprint affecting bottom and water column;

d) Impacts (temporary and/or permanent) to aquatic areas required for access to the aquaculture facility/gear, and remedial measures proposed to restore temporarily affected aquatic areas;

e) Substrate type of bottom affected by proposed activities (particularly for on-bottom activities).

v. Cross-sectional view of proposed aquaculture structures and all associated apparatus that represents the proposed operations of the activity (on-bottom, suspended, or floating).

vi. If the applicant proposes work in waters adjacent to property owned by others, the applicant must provide proof of notification to adjacent property owners via certified mail, return receipt requested. In addition, the applicant may include any statement of no objection or comments from the adjacent property owner(s).

vii. The PCN must include detailed information that clearly identifies how adverse effects to navigation and/or ingress to and egress from neighboring properties has been avoided.