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OIL AND GAS DIVISION

March 22, 2012

Ms. Kristi McMillan
U.S. Army Corps of Engineers
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Rebecca Hensley, Regional Director
Ecosystem Resources program
Science and Policy Branch
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Re: USACE Nationwide Permits

Dear Ms. Sloan:

The letter is in response to the public notice dated February 21, 2012,regarding certification of the United States Army Corps of Engineers (USACE) Nationwide Permits (NWPs) pursuant to Section 404 of the Clean Water Act. Final notice of the NPWs was published in the Federal Register (Vol. 77, No. 34, pages 10184-10290) on February 21, 2012.

Under Texas Natural Resources Code, Title 3, and the Texas Water Code, Chapter 26, the Railroad Commission of Texas (RRC) has responsibility for the prevention of pollution that might result from activities associated with exploration, development, and production of oil, gas, or geothermal resources of the State and to prevent operations dangerous to life or property. Texas Natural Resources Code, §91.101, and Texas Water Code, §26.131, grants the RRC jurisdiction for water quality certifications for federal permits covering activities associated with the exploration, development, and production of oil, gas or geothermal resources that may result in discharges to waters of the United States. No person may conduct any activity subject to RRC jurisdiction pursuant to a Corps permit if that activity may result in a discharge into to waters of the United States within the boundaries of the State of Texas, unless the RRC has first issued a certification or waiver of certification under 16 Texas Administrative Code §3.93 (Rule 93). This certification decision is limited to those activities under the jurisdiction of the Railroad Commission of Texas (RRC), which generally include activities related to the exploration, development, and production of oil and gas and geothermal resources, including pipeline transportation.

This office has reviewed the U.S. Army Corps of Engineers Nationwide Permits (NWPs) 2 (Structures in Artificial Canals), 3 (Maintenance), 6 (Survey Activities), 7 (Outfall Structures and Associated Intake Structures), 8 (Oil and Gas Structures on the Outer Continental Shelf), 12 (Utility Line Activities), 14 (Linear Transportation Projects), 16 (Return Water From Upland Contained Disposal Areas), 18 (Minor Discharges), 19 (Minor Dredging), 20 (Oil Spill Cleanup), 25 (Structural Discharges), 38 (Cleanup of Hazardous and Toxic Waste), 43 (Stormwater Management Facilities), and 46 (Discharges in Ditches).

The USACE proposed no changes to NWPs 2, 7, 14, 16, 18, 19, 25, 38, and 46 and proposed very minor changes to NWP 8. USACE proposed changes to NWPs 3, 6, 12, 20, and 43.

USACE proposed modification to NWP 3 to clarify that stream channel excavation immediately adjacent to the structure or fill being maintained is authorized and does not require a PCN and to indicate that the activity does not need to include the placement of new or additional riprap to qualify for this NWP.

USACE proposed to modify NWP 6, Survey activities, to specify how exploratory trenches are backfilled by stating the work "must not drain a water of the United States" and to replace the 25 cubic yard limit for temporary pads with a 1/10-acre limit and to add sample plots or transects for wetland delineations" as an example of an activity authorized by this NWP.

USACE proposed to modify NWP 12, Utility Line Activities, to codify in the permit existing instructions for calculating the loss of waters of the United States for a single and complete project that involves an access road.

USACE proposed to modify NWP 20, Response Operation for Oil and Hazardous Substances, to change the name of this NWP, modify its terms and conditions to authorize a wider set of activities, such as containment and mitigation actions, to more effectively authorize efforts to manage releases of oil or hazardous substances, and to authorize training exercises for the cleanup of oil and hazardous substances, including those that involve temporary structures or fills.

USACE proposed to modify NWP 43, Stormwater Management Facilities, to add low impact development stormwater management features to the examples of types of stormwater management facilities that may be authorized and to change the waiver provision for activities resulting in the loss of greater than 300 linear feet of intermittent and ephemeral stream bed, to clarify that the district engineer will only issue the waiver after making a project-specific written determination that the activity will result in minimal adverse effects.

The Texas Commission on Environmental Quality (TCEQ) has not yet issued its water quality certification for activities under its jurisdiction. However, this office has reviewed, and concurs with, the recommendations TCEQ included in its letter dated April 11, 2011.

Direct, indirect, and cumulative impacts to the resources of the project area as a result of these NWPs are expected to be minimal, short-term, and localized. Therefore, this office believes that the proposed NWPs, as conditioned generally and regionally, will not significantly affect the quality of the marine environment. Based on my review of the application, there is reasonable assurance that the activities under these NWPs, conditioned generally and regionally, and conducted in accordance with applicable state and federal regulations, will not cause a violation of applicable water quality requirements. The Railroad Commission hereby issues Water Quality Certification of the referenced NWPs.

The RRC 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 CMP regulations (31 Texas Administrative Code Section 505.30), and has determined that the action is consistent with the applicable goals and policies of the CMP, with the following condition:

By letters dated April 11, 2011, and November 22, 2011, the Texas Parks and Wildlife Department (TPWC) provided recommendations to Regional Conditions 1, 3, 10, 11, 12, 13, and 15. TPWD stated in both letters that the revised Texas Regional Conditions for the NWPs did not satisfactorily incorporate TPWD's recommendations regarding development of a new Regional Condition that would recognize and include state designated areas with special ecological significance as Critical Resource Waters. USACE has defined critical resource waters to include marine sanctuaries and marine monuments managed by the National Oceanic and Atmospheric Administration, and National Estuarine Research Reserves—areas only designated by the federal government. USACE's response to TWPD's and similar recommendations relating to state designated areas indicates that "District engineers may designate additional critical resource waters, after notice and an opportunity for public comment. Division engineers may also impose regional conditions to restrict or prohibit the use of this NWP in specific categories of waters or in certain geographic areas." We formally request that, for all discharges proposed for authorization under nationwide permits associated with oil and gas exploration, development and production under the jurisdiction of the Railroad Commission of Texas, USACE begin such a process in coordination with TPWD and other appropriate state natural resource agencies as soon as possible. Until such time as the USACE has completed this process, this office has no problem with the use of the NWPs. However, we request that USACE coordinate with the TPWD on any request for activity in the areas noted by the TPWD for which a PCN is required until that time.

The RRC reserves the right to modify this certification should it be determined that significant cumulative or secondary impacts are occurring as a result of the activities authorized by the USACE under these NPWs and should the public notice published on February 21, 2012, elicit additional comment or recommendations not heretofore addressed by the USACE.

Please contact me at (512)463-7308 or leslie.savage@rrc.state.tx.us if you have any questions or require additional information.

Sincerely yours,

Leslie Savage, CMP Coordinator and Water Quality Certification Agent
Oil and Gas Division, Railroad Commission of Texas

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