



1201 15th Street NW
Washington, DC 20005

T 800 368 5242
F 202 266 8400

www.nahb.org

July 3, 2015

Colonel J. Richard Jordan, III
U.S. Army Corps of Engineers
Baltimore District
10 South Howard Street
Baltimore, MD 21201

Colonel Bernard R. Lindstrom
U.S. Army Corps of Engineers
Pittsburgh District
1000 Liberty Avenue
Pittsburgh, PA 15222

Lt. Colonel Michael Bliss
U.S. Army Corps of Engineers
Philadelphia District
100 Penn Square East
Philadelphia, PA 19107

Subject: Failure to Follow Regulation prior to Issuing Public Notices #15-30 and #15-39 and Request for Relief

The purpose of this letter is to express concerns regarding the U.S. Army Corps of Engineers' (Corps) Baltimore, Philadelphia, and Pittsburgh Districts' recent issuance of Special Public Notices that will retroactively impose special conditions on all Clean Water Act (CWA) Nationwide, Individual, and General Permits due to the recent listing of the Northern Long-Eared Bat under the Endangered Species Act. On behalf of our members within the District of Columbia, the State of Maryland, and the Commonwealth of Pennsylvania, the National Association of Home Builders (NAHB) requests that the Corps withdraw Special Public Notices #15-30 and #15-39 until such time as the Corps provides the regulated community with an opportunity for review and public comment as required by the Corps' regulations.

Overview

On May 4, 2015, the Northern Long-Eared Bat (NLEB) was officially listed as a threatened species under the Endangered Species Act (ESA). The same day, the Corps' Baltimore District, Philadelphia District, and Pittsburgh District jointly issued Special Public Notice #15-30 to notify the public of the recent federal listing of NLEB and the associated requirements for coordination with the U.S. Fish and Wildlife Service (USFWS). Special Public Notice #15-30 applies to all CWA authorizations within the Commonwealth of Pennsylvania. On June 25, 2015, the Corps' Baltimore District issued Special Public Notice #15-39, which focuses on CWA authorizations within the State of Maryland and the District of Columbia.

Public Notices #15-30 and #15-39 alert interested parties to the establishment of a Special Condition for Rivers and Harbors Act Section 10 permits and Clean Water Act Section 404 permits in Pennsylvania and Maryland / the District of Columbia, respectively. According to the Corps, these two public notices affect not only pending CWA 404 permit requests that are still undergoing review by the Corps, but also permits for projects that were previously authorized or verified by the Corps where the authorized activity had not been completed by the date these notices were issued.

To ensure compliance with ESA Section 7 for the newly listed NLEB, the notices add Special Conditions to previous CWA authorizations that require permittees to screen for NLEB before any regulated activity occurs. This screening must be completed by the permittee using an online screening tool or by directly coordinating with the appropriate USFWS field office. If the screening indicates the presence of possible habitat, avoidance measures will be identified and will become new Special Conditions that will be added to the previously issued permit. If the permittee does not agree to implement the avoidance

measures, he/she may contact the Corps who will reinitiate consultation with USFWS. The permittee cannot perform any additional work on the project until notified by the Corps that ESA section 7 consultation is complete.

According to Public Notice #15-39, if a screening in Maryland or the District of Columbia reveals possible NLEB suitable summer habitat and the project involves a contiguous area of permanent tree clearing that is equal to or greater than 1 acre and for which the tree clearing has not been completed before June 25, 2015, the permittee must refrain from any tree clearing activity between April 15 and September 1 of any year or agree to conduct summer habitat surveys for bats between June 1 and August 15. If no bats are found, no tree clearing restrictions are required.

Corps' Requirements

All federal agencies, including the Corps, have a statutory and regulatory obligation to comply with ESA's Section 7(a)(2) consultation requirements to ensure any activity they authorize is not likely to jeopardize the continued existence of a listed species. The Corps currently does this through specific consultations for individual permits and by attaching Special Conditions to the use of general and nationwide permits. Recognizing that the identification and listing of endangered and threatened species and their critical habitat changes over time, the Corps has an obligation to proactively identify and resolve potential conflicts resulting a species proposed for listing by requesting an informal conference with USFWS to identify recommended actions to reduce adverse effects of the proposed action upon the species according to 50 CFR Part 402.10.

Recognizing that conditions and information change, the Corps also has processes in place to address those changes and revise permit authorizations, as necessary. The nationwide permit regulations, for example, include a formal process for Division Engineers (DEs) to modify, suspend, or revoke nationwide permits in accordance with 33 CFR Part 330.5. Similarly, 33 CFR Part 325.7 outlines the processes that must be followed for individual permits and general permits.

Corps Regulatory Processes Ignored

Unfortunately, in their haste to issue Public Notices #15-30 and #15-39, the Baltimore, Philadelphia, and Pittsburgh Districts failed to follow their own procedures. Corps' regulations at 33 CFR Part 330.5 specifically require the DE to provide an opportunity for interested parties to express their views on the proposed action and provide opportunity for interested parties to request a public hearing *prior to* modifying permits via a public notice. Additionally, the DE must fully consider the views of affected parties and prepare supplemental documentation for any modifications to the permits, including comments received and how they were considered in making any final decision. Finally, the DE must provide, if appropriate, a grandfathering period for those permit applicants who have already received authorization and have commenced work or are under contract to commence work authorized under a nationwide permit.

Contrary to these mandates, both Public Notices #15-30 and #15-39 were issued without an opportunity for permittees to express their concerns or request a public hearing. As a result, affected parties were not given any advanced notice or allowed any opportunity to suggest solutions or alternatives. Additionally, the Corps failed to gather any public input or give any public consideration for allowing any tree clearing activities associated with previously authorized permits to be completed. Home building is

July 3, 2015

Page 3

a highly regulated and difficult industry to enter due to the many regulatory requirements at all levels of government. It becomes even more difficult when the rules change absent any notification or opportunity to explain their on-the-ground impacts.

It is now peak construction season across the nation, yet these new rules have the potential to stop this economic development in its tracks. In light of the project delays, confusion, and investment challenges caused by applying NLEB seasonal tree clearing restrictions retroactively on home builders and land developers in Pennsylvania, Maryland, and DC, NAHB requests that Special Public Notices #15-30 and #15-39 be withdrawn until the Corps provides an opportunity for interested parties to provide comments on the proposed special conditions and express their views at a public hearing. The Corps should also consider and request public input on grandfathering tree clearing activities for previously authorized permits within the three Corps Districts. Only after these steps are taken can the Corps, if necessary, issue public notices modifying previously authorized permits.

If you have any questions or would like to discuss any of the issues raised, please contact Michael Mittelholzer, Assistant Vice President, at mmittelholzer@nahb.org or (202) 266-8660.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan Asmus". The signature is fluid and cursive, with a long horizontal stroke at the end.

Susan Asmus, Senior Vice President, Regulatory Affairs
National Association of Home Builders