



**US Army Corps
of Engineers®**
New England District

696 Virginia Road
Concord, MA 01742-2751

PUBLIC NOTICE

Date: August 10, 2004
Comment Due Date: September 9, 2004
In Reply Refer To: Greg Penta
E-mail: gregory.r.penta@usace.army.mil

REISSUANCE OF THE DEPARTMENT OF THE ARMY MASSACHUSETTS PROGRAMMATIC GENERAL PERMIT (PGP)

The New England District, U.S. Army Corps of Engineers, 696 Virginia Road, Concord, MA 01742-2751 hereby proposes to reissue the statewide Massachusetts Programmatic General Permit (PGP), pursuant to 33 CFR Part 325.5(c)(3), for minimal-impact activities within the Commonwealth of Massachusetts. The existing PGP expires on January 11, 2005 and we proposed to reissue the PGP for another five years no later than this date. The reissued PGP will continue the expedited review process for activities in Corps jurisdiction under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. This public notice is issued in accordance with 33 CFR 325.3(b) to coordinate reissuance of the PGP with Federal resource agencies, state agencies and the public.

Programmatic General Permits are encouraged under the President's plan as a way to streamline state and Federal regulatory programs. The New England District has already had success with streamlining these programs with the use of PGP's throughout New England. Continued utilization of the very successful PGP process in place of the nationwide permits (NWP's) will provide benefits to the public, including simplifying the process and expediting decisions while maintaining environmental protection. This PGP would authorize activities formerly covered under the NWP program and currently covered under the existing PGP. The New England District's District Engineer suspended all nationwide permits in the six New England states on March 29, 2002. The suspensions will remain in effect for five years from March 18, 2002 effective date of reissuance of the NWP's unless rescinded by the Division Engineer.

Projects with minimal individual and cumulative effects on the aquatic environment will be approved administratively under this PGP. Projects with the potential for more than minimal effects will be subjected to Individual Permit review as detailed in 33 CFR Part 325 – Processing of Department of the Army Permits. All PGP authorizations will be subject to the applicability requirements, procedures, and conditions contained in the PGP documentation. Project eligibility under this PGP will fall into two categories: non-reporting projects (Category I) and reporting projects requiring screening (Category II).

Representatives of the Corps, state agencies and the Federal resource agencies (U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, and National Marine Fisheries Service) will continue to review Category II activities as outlined within the MA PGP. The current document is located on our web site at www.nae.usace.army.mil. Please go to "Regulatory/Permitting," "State Programmatic General Permits" and then "Massachusetts." You may also call Mr. Penta for a copy at (978) 318-8862.

Projects that do not meet the terms and conditions of the PGP will require an Individual Permit. The PGP reissuance does not alter the Individual Permit review procedures, or Federal exemptions, which are not necessarily the same as the Commonwealth of Massachusetts's exemptions. In addition, individual PGP authorizations are not valid until all other required Federal, state and local permits and/or certifications are obtained. Through interagency screening, the Corps will determine if the individual and cumulative adverse environmental impacts are minimal and whether a project may proceed under PGP authorization.

The proposed PGP does not affect activities authorized under the existing PGP that have commenced work prior to the re-issuance. Activities which have commenced (i.e., are under construction or are under contract to commence) prior to the re-issuance date of this general permit, in reliance upon the terms and conditions of the category under which it was authorized, shall remain authorized provided the activity is completed by the project-specific date the Corps provides to the permittee in the PGP authorization letter.

EFH

In 1996, the Magnuson-Stevens Fishery Conservation and Management Act was amended to require the Federal fishery management councils (Councils) to designate Essential Fish Habitat (EFH) for all Federally managed fish species. The EFH applies to those waters and substrates necessary to fish for spawning, feeding, breeding, and growth to maturity. The EFH designations made by the Councils include most of Massachusetts's coastal waters and most estuaries and rivers for up to 44 species marine species. Section 305 (b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act requires that Federal agencies proposing to authorize, fund, or to undertake actions which may adversely effect EFH consult with National Marine Fisheries Service (NMFS) regarding the action. Accordingly, the Corps has and continues to consult with NMFS regarding the actions permitted under the PGP. For certain types of actions that will likely result in no more than minimal adverse effects to EFH individually and cumulatively, NMFS has issued a statement of General Concurrence in accordance with the requirements of 50 CFR 600.920(f), dated 3 March 2000. The General Concurrence covers EFH consultation requirements for those activities permitted by the Corps, which individually and cumulatively have no more than minimal adverse effects on EFH.

The General Concurrence was drafted to cover most activities that would fall under the Category II of the PGP. The General Concurrence will cover those Category II actions in which NMFS concurs with the Corps determinations that the activity will result in no more than minimal adverse effects to EFH. In cases where NMFS does not concur with the Corps determination, NMFS will notify the Corps during interagency coordination meetings or by other established means that this General Concurrence will not cover a specific Category II action. The NMFS will periodically review its findings of General Concurrence and may revise or revoke a General Concurrence if new information indicates that the covered actions are having more than minimal adverse effects on EFH.

Water Quality Certification and Coastal Zone Management Consistency

The Corps is simultaneously requesting the Massachusetts Department of Environmental Protection (DEP) and the Massachusetts Office of Coastal Zone Management (CZM) determine whether to issue, deny or waive Water Quality Certification and Coastal Zone Consistency, respectively. The Massachusetts DEP will issue a notice regarding their tentative determination, therefore please send comments regarding WQC/Section 401 to the Massachusetts DEP.

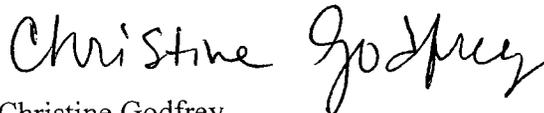
Proposed Changes

We propose the changes and improvements listed on the following page. You can view the proposed Massachusetts PGP that includes all of the proposed changes on our web site at <http://www.nae.usace.army.mil>. Please go to "Regulatory/ Permitting," "Topics and Issues" and then "Proposed MA PGP." You may also call Mr. Penta for a copy at (978) 318-8862.

Comments

We are seeking public comment in order to properly evaluate the proposed PGP and suspension of the Nationwide Permits in Massachusetts. Anyone wishing to comment is encouraged to do so in writing within the comment period specified in this notice. Comments should be submitted to: Mr. Greg Penta, Regulatory Division, U.S. Army Corps of Engineers, 696 Virginia Road, Concord, Massachusetts 01742-2751. If you have any questions, please contact Mr. Penta at (978) 318-8862.

Any person may request, in writing, within the comment period specified in this notice, that a public hearing be held to consider this proposal. Requests for a public hearing shall specifically state the reasons for holding a public hearing. The Corps holds public hearings for the purpose of obtaining public comments when that is the best means for understanding a wide variety of concerns from a diverse segment of the public.


Christine Godfrey
Chief, Regulatory Division

1. GENERAL CHANGE:

Page 4, Information typically required. We would like to require that all plans now show the NGVD 1929 equivalent for a project's vertical datum (MLW, MLLW or NGVD for tidal projects) with the vertical units, and that plans not use a local datum.

2. GENERAL PERMIT CONDITIONS:

General Condition 11. Wild and Scenic Rivers. The last sentence was changed as follows to reflect changes to the Taunton River's status; "The Taunton River, from the confluence of the Town River and Matfield River in Bridgewater downstream to the Mt. Hope Bay in Fall River, is under congressionally authorized study as a potential addition to the Wild and Scenic Rivers System."

General Condition 16. Heavy Equipment in Wetlands. The Corps published its new definition of fill material in the May 9, 2002 Federal Register. The new definition promulgated at 33 CFR 323.2 states: "...the term fill material means material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States. (2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States."

Therefore, we propose to add the following words to General Condition 16, "Mats are considered fill" and to describe mats by preceding that word with "swamp or timber."

General Condition 17. Temporary Fill. We now consider swamp and timber mats as fill. We propose the addition of the following words, "Mats or corduroy roads (See 16 above) are considered temporary fill when removed before a project's completion. You must add their total coverage area to the overall wetland impact area for your project when determining whether your project qualifies for an Individual Permit or Category 1 or 2 of this PGP."

General Condition 23. Spawning Areas. Add the following italicized words "Discharges *and/or suspended sediment producing activities* in fish and shellfish spawning or nursery areas during spawning seasons shall be avoided. During all times of year, impacts to these areas shall be avoided or minimized to the maximum extent practicable."

General Condition 27. Maintenance, was modified as follows: "27. Maintenance. The permittee shall maintain the activity authorized by this permit in good condition and in conformance with the terms and conditions of this permit. This does not include maintenance of dredging projects. Maintenance dredging is subject to the review thresholds in Appendix A: Definition of Categories (attached), and/or any conditions included in a written Corps authorization. Maintenance dredging includes only those areas and depths previously authorized and dredged. Some maintenance activities may not be subject to regulation under Section 404 in accordance with 33 CFR 323.4(a)(2)."

3. CONTACTS FOR PROGRAMMATIC GENERAL PERMIT:

The contact list beginning on Page 16 was modified to add related websites and e-mail addresses. We have posted these changes to our web site at <http://www.nae.usace.army.mil>. Please go to "Regulatory/Permitting" and then click "Useful Links."

4. APPENDIX A - DEFINITION OF CATEGORIES

I. Inland Waters and Wetlands, (a) New Fill/Excavation Discharges, Category 2

The following changes, noted with italicized words and crossouts, are proposed to clarify what we consider to be proactive restoration: “*Projects with proactive restoration as a primary purpose* ~~projects~~ with any ~~amount of~~ impact amount can be reviewed under Cat.2. The Corps, in consultation with Federal and state agencies, must determine that net adverse effects are not more than minimal.”

The following was added to this category at EPA’s request: “Specific activities required to affect the containment, stabilization, or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority. Wetlands must be restored in place.”

I. Inland Waters and Wetlands, (c) Repair and Maintenance of Authorized Fills, Category 1 and

II. Navigable Waters, (b) Repair and Maintenance Work, Category 1.

Section I would read, “*Conditions of the original authorization apply, however minor deviations in fill design allowed.¹²” Section II would read, “*Must be rebuilt in same footprint, however minor deviations in structure design allowed.¹²” The Endnotes/Definitions would state: “Minor deviations in the structure’s configuration or filled area, including those due to changes in materials, construction techniques, or current construction codes or safety standards which are necessary to make repair, rehabilitation, or replacement are permitted, provided the adverse environmental effects resulting from such repair, rehabilitation, or replacement are minimal. Minimal includes, but is not limited to, fewer piles, less decking shading waters, less fill. Additional decking, piles or fill (includes bulkhead replacement forward of the existing bulkhead) aren’t allowed in Category 1.”

This is proposed because the existing Corps policy of allowing proponents to build coastal engineering structures in the same footprint discourages the reduction of the adverse impacts of the structure. Technology and understanding of coastal processes has changed; structures that are old enough to be considered grandfathered were built in ways that generally cause adverse impacts to navigable waters (e.g., increased scour associated with vertical structures). Rebuilding in the same footprint is an incentive for applicants to keep the same structure and not reduce the impacts, such as those listed in the conditions of the PGP for coastal bank stabilization.

II. Navigable Waters, (a) Fill, Category 1.

We propose to add the following wording, similar to Nationwide Permit 15, to the PGP. This would allow the USCG to authorize Section 404 fill activities associated with bridge construction and thereby reduce the regulatory burden on the public associated with applying to two agencies.

“Discharges of dredged or fill material incidental to the construction of bridges across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills, provided the U.S. Coast Guard authorizes such discharges as part of the bridge permit. Causeways and approach fills are not included in this category and require Category 2 or Individual Permit authorization.”

II. Navigable Waters, (a) Fill, Category 2.

Category previously stated: “Up to 1 acre fill and/or secondary waterway and wetland impacts (e.g., areas drained or flooded). Fill includes temporary and permanent waterway fill.” This contradicts the

following statement in the same category, “no permanent fill and/or excavation in special aquatic sites.” Therefore, “and wetland” is removed from the statement above.

The addition of the following italicized words is proposed to help clarify what we consider to be proactive restoration, “No permanent fill and/or excavation in SAS⁶ ~~special aquatic sites~~ except when associated with a project with proactive restoration ~~project~~ *as a primary purpose.*”

The Massachusetts CZM requested we allow Category 2 review for projects proposing up to 1 acre of permanent fill/excavation in SAS for a water-dependent industrial use in a MA DEP Designated Port Area (DPA). This limited change would only apply to specific types of project within the 11 DPA’s in the state, promote commercial maritime activity within these areas, and would be consistent with state coastal policy (implemented through the Wetlands Protection Act and Massachusetts DEP Chapter 91).

II. Navigable Waters, (c) Dredging, Category 1

We propose the following addition to the PGP to assist with the cleanup of contaminated sediments in New Bedford Harbor, one of three National Oceanic and Atmospheric Administration designated Portfields in the United States.

“New Bedford Harbor navigational dredging with disposal either in locations approved by EPA in accordance with the New Bedford Harbor Superfund Site Record of Decision or in Confined Aquatic Disposal (CAD) cells specifically identified under the Final EIR for the Dredged Material Management Plan (DMMP) for New Bedford and Fairhaven, MA (EOEA No. 11669).”

II. Navigable Waters, (c) Dredging, Category 2

We propose allowing beach nourishment >1 acre in Category 2. This can be accomplished by adding the following italicized words to the existing Category 2 qualifier. A distinction was made between dredging for nourishment vs. navigational purposes. Also, we propose to allow confined aquatic disposal in Category 2.

- Disposal includes upland, beach nourishment *<1 acre of fill, beach nourishment >1 acre if sand is from an upland source or the dredging’s primary purpose is navigation and Corps, in consultation w/Federal and State agencies, determines that net adverse effects are not more than minimal. Open water and confined aquatic disposal, if Corps, in consultation with Federal and State agencies, finds the material suitable.*

II. Navigable Waters, (e) Pile-Supported Structures and Floats, Category 1

The Massachusetts CZM requested we list the following qualifiers for Category 1 projects:

1. “Floats supported at least 2.5’ above the substrate during all tides.” This is similar to the guidance listed in DEP’s 2003 document entitled, “Small Docks and Piers, A Guide to Permitting Small, Pile-Supported Docks and Piers,” which recommends 1.5’ above the substrate and 2.5’ above substrate containing shellfish.
2. “No structure extends >25% of the waterway width at mean low water.” This would maintain 50% of the width as open water, an even split, between public and private interest.
3. “No Special Aquatic Site located within 25’ of any structure.”