

(a) Events that are not located in, proximate to, or above an area designated as environmentally sensitive by an environmental agency of the Federal, State, or local government. For example, environmentally sensitive areas may include such areas as critical habitats or migration routes for endangered or threatened species or important fish or shellfish nursery areas.

(b) Events that are located in, proximate to, or above an area designated as environmentally sensitive by an environmental agency of the Federal, State, or local government and for which the Coast Guard determines, based on consultation with the Government agency, that the event will not significantly affect the environmentally sensitive area. (Checklist and CED required.)

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Department of the Army; Corps of Engineers

Proposed Regulatory Guidance Letter on Programmatic General Permits

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent and request for comments.

SUMMARY: The Corps of Engineers is proposing to issue a Regulatory Guidance Letter (RGL) which would establish National policy guidance for the development and implementation of Programmatic General Permits (PGP). PGPs are a type of general permit issued by the Corps, that authorizes, for the purposes of Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403), Section 404 of the Clean Water Act (33 U.S.C. 1344), and/or Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413), certain projects that are also regulated by another Federal, tribal, state, or local regulatory authority. This notice provides the proposed PGP RGL for review and opportunity to comment. RGLs are used by the Corps Headquarters as a means to transmit guidance on the regulatory program (33 CFR Parts 320-330), to its division and district engineers. While not required by law or regulation, the Corps is publishing this PGP RGL for review and comment.

DATES: Comments on the proposed PGP RGL must be received by May 28, 1996.

ADDRESSES: Comments may be mailed to the U.S. Army Corps of Engineers, ATTN: CECW-OR, PGP Docket, 20 Massachusetts Avenue, NW.,

Washington, DC 20314-1000 or faxed to (202) 761-5096.

FOR FURTHER INFORMATION CONTACT: Mr. Victor Cole, Regulatory Branch, Office of the Chief of Engineers at (202) 761-0199.

SUPPLEMENTARY INFORMATION: The Clinton Administration's Wetlands Plan promotes State involvement through assumption of the Clean Water Act Section 404 program (through Section 404 g-1) and/or PGP development. Many States have chosen to pursue a PGP with the Corps in lieu of State assumption or as an initial first step to assumption. Regardless of the reason, the Corps encourages the use of PGPs as a effective mechanism to reduce duplicative regulatory processes, simplify the application process for applicants, and make wise use of limited resources, while continuing to protect the aquatic environment in at least an equivalent manner as the Corps program. Our efforts to prepare a draft PGP RGL for publication involved coordination with several states, Corps districts, and other Federal resource agencies. The draft PGP RGL was developed based upon this coordination and structured similar to several successful PGPs that have been issued by Corps districts. The draft PGP RGL was also provided for review and comment to the White House Wetlands Working Group. Upon review and consideration of comments received, the Corps will publish the final PGP RGL in the Federal Register.

Dated: April 1, 1996.

Approved:

Daniel R. Burns,

Chief, Operations, Construction, and Readiness Division, Directorate of Civil Works.

Regulatory Guidance Letter

RGL 96-01, Date: pending, Expires: pending

Subject: Programmatic General Permits, Including State Program General Permits

1. Background and Purpose

a. The development of a programmatic general permit (PGP) is an effective mechanism available to the U.S. Army Corps of Engineers (Corps) and Federal, tribal, State, and local regulatory authorities (other regulatory authority (ORA)) to improve the regulatory process for applicants, enhance environmental protection, reduce unnecessary duplicative procedures and evaluations, and make more efficient use of limited resources. The partnership that develops between the Corps and the ORA will directly benefit the regulated public and effectively reduce unnecessary

duplication while maintaining important environmental safeguards. Our encouragement of the use of PGPs should not be viewed as an attempt to allow the Corps to evade its statutory responsibility to administer the Regulatory Program, nor as an attempt to delegate the Regulatory Program, or simply to reduce the Corps workload. In times of increasing fiscal pressure, all levels of Government must redouble their efforts to use resources as efficiently as possible. PGPs can provide an efficient mechanism to meet this objective, to maintain important environmental protection, and to provide improved service to the regulated public.

b. A PGP is a type of general permit (33 CFR 322.2(f) and 323.2(h)), issued by the Corps, that authorizes, for the purposes of Section 10 of the Rivers and Harbors Act of 1899 (RFA; 33 U.S.C. 403), Section 404 of the Clean Water Act (CWA; 33 U.S.C. 1344), and/or Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (MPRSA; 33 U.S.C. 1413), certain projects that are also regulated by another Federal, tribal, State, or local regulatory authority. A PGP is the written vehicle identifying the terms, limitations, and conditions under which specific projects regulated by an ORA program may be authorized under the Corps Regulatory Program with a much more efficient and abbreviated review by the Corps. Programmatic general permits are designed to:

(1) Simplify the evaluation process for both the regulatory agencies and the applicant (i.e., to strive for "one-stop-shopping");

(2) Provide at least equivalent (and sometimes enhanced) environmental protection for aquatic resources;

(3) Reduce unnecessary duplicative project evaluation; and

(4) Promote more effective and efficient use of Corps, as well as other agencies', resources.

c. While administering the Regulatory Program, the Corps attempts to minimize duplication of effort with ORA programs that protect the aquatic environment in a manner at least equivalent to the Corps Regulatory Program. Minimizing duplication of effort serves the best interests of the regulated public, by reducing or eliminating unnecessary paperwork, reviews, and delays, and also serves the best interests of the environment and all other aspects of the public interest, by allowing the Corps to use its limited regulatory resources where they will do the most good. Moreover, in many cases when an ORA program develops to the extent that a PGP is appropriate, the

environmental protection from the PGP is greater than that offered by the Corps Regulatory Program without the PGP. Greater protection is achieved because the combined Federal, tribal, State, and/or local resources are available, and are more efficiently utilized to regulate potentially harmful activities, and to ensure that the terms and conditions of the PGP are enforced.

d. Pursuant to Section 404 of the CWA, Section 10 of the RHA, and Section 103 of the MPRSA, the Corps has the authority to issue general permits (regional, programmatic, and nationwide) for any category of projects that are substantially similar in nature, and result in no more than minimal adverse effects on the environment, either individually or cumulatively. General permits are actively utilized in the Corps Regulatory Program. Each year the Corps authorizes more than 20,000 projects under regional general permits and more than 60,000 projects under nationwide general permits. Approximately 50 of the Corps existing general permits are PGPs that were developed in conjunction with an ORA. Terms and conditions of general permits, including PGPs, are just as enforceable as terms and conditions of individual permits, and compliance with a PGP ultimately depends upon whether an applicant adheres to the terms and conditions established by or incorporated in the PGP. The development of a PGP will reduce unnecessary duplication between the Corps and the ORA, which will allow the Corps to focus its limited resources on the remaining projects requiring individual authorization, enforcement, monitoring, compliance, etc. Corps workload reductions ultimately achieved through PGPs will facilitate more thorough and expeditious individual permit evaluations and increases in monitoring and enforcement of permit conditions. During the initial implementation of the PGP with the ORA, the Corps workload may not be reduced due to the period of time necessary for the Corps, Federal resource agencies, and the public to reach a level of confidence with the ORA's ability to implement the ORA program, in concert with the PGP. Although the Corps workload reduction values may not be achieved upon issuance of the PGP, the value of an improved process for applicants and enhanced coordination between the Corps and the ORA warrant pursuing a PGP. Ultimately, workloads should be reduced through effective use of a PGP.

e. The Corps will, on a continuing basis and in coordination with ORAs and Federal and State resource agencies,

identify opportunities to develop and establish PGPs based on Federal, tribal, State, and local programs that regulate projects in waters of the United States. The Corps district will be the point of contact with the ORA to develop a PGP. Corps districts should encourage other Federal and State resource agencies to provide information regarding potential opportunities for PGPs and to participate actively during the development and evaluation of PGPs.

f. Some PGPs have been developed with an ORA to cover relatively broad regulatory programs. For example, the Corps has established a PGP in North Carolina covering projects regulated under that State's Coastal Zone Management Program, and in Massachusetts for projects regulated under the State's wetland regulatory program. In addition, the Corps has numerous PGPs based on regional or local programs, reservoir authorities, etc. These may cover projects regulated by county or regional regulatory programs administered under State authority. The Corps has developed PGPs with several counties in Florida for minor projects involving waterfront residential development. The Corps has also developed a PGP with the Tennessee Valley Authority that regulates certain projects within their reservoirs. As more tribal, State, and local governments establish wetland or aquatic resource regulatory programs, the Corps should increase its efforts to develop environmentally sound PGPs to reduce unnecessary duplication. One of the key benefits of PGPs is the flexibility they afford ORAs in terms of the projects regulated and the geographic scope of regulation. The ORA program should ideally cover all waters of the United States under Corps jurisdiction, which should simplify and reduce confusion in the application process for applicants. However, a PGP cannot be used to limit or to reduce Corps regulatory jurisdiction in any way.

g. The Corps will develop PGPs only where the ORA program provides, with the necessary Corps conditions or review, the same or higher level of environmental protection as that provided by the overall Corps Regulatory Program. In addition to PGP-specific conditions and the requirements in section 3 below, there are inherent aspects of the Corps program that ensure continued strong protection of the environment under PGPs. First, all general permits are valid for a maximum of five years and must be reevaluated prior to reissuance. This ensures that the Corps will evaluate the operation of every PGP and the level of environmental protection it provides at

least every five years. Second, the Corps retains the authority to modify, suspend, or revoke a PGP when the Corps district believes that appropriate protection is not being afforded to the environment or any other aspect of the public interest, or when the Corps concludes that adverse environmental effects are more than minimal, either individually or cumulatively. Third, and perhaps most important, the Corps always retains its authority to require an individual Corps permit in any given case for any particular project, even if the project otherwise meets all the requirements of the PGP. The Corps will exercise this authority when it concludes that the processing of an individual Corps permit is necessary to protect the environment or any other aspect of the public interest, or when impacts are more than minimal, either individually or cumulatively. Finally, the Corps retains the full range of its enforcement authority and options where it believes that a project does not comply with the terms or conditions of a PGP, regardless of whether the ORA authorized the project under its program.

h. When the Corps and the ORA determine that the development of a specific PGP is warranted,¹ the procedures for the development of regional general permits will be utilized (33 CFR Part 325). The Corps will initiate early coordination (e.g., a scoping meeting) with the ORA, Federal and State natural resource agencies, the State agency responsible for Section 401 of the CWA, the State Coastal Zone Management Agency, the State Historic Preservation Office, and/or any other appropriate agency, to discuss the proposed PGP and to identify potential concerns. Discussions regarding the development of a PGP will be led by the Corps with the ORA with which the PGP may be developed. Upon completion of the early coordination phase, the Corps will issue a public notice (for a minimum of 30 days) describing the proposed PGP, including any proposed terms and conditions under which specific projects may be authorized by the Corps under the terms and conditions of the PGP. Public hearings and/or public meetings will be held, as appropriate (33 CFR part 327). The Corps will evaluate and consider fully all comments from the resource agencies, the ORA, other appropriate agencies, and the public. A combined decision document, including National Environmental Policy Act

¹ Funding for the development of the PGP may be available through the U.S. Environmental Protection Agency State Wetland Grant Program.

environmental documentation, the statement of findings, and Section 404(b)(1) Guidelines analysis, as appropriate, will be prepared by the Corps pursuant to current regulations, policies, and guidance.

i. This Regulatory Guidance Letter (RGL) is not intended to require that any PGP that is already in effect and operating need necessarily be immediately revised to conform with this guidance. However, at the end of that PGPs five-year life (or sooner if appropriate), the district engineer should ensure that the PGP, if re-issued, will comply with this guidance, and make any necessary revisions.

2. Definitions

Several terms are being defined for purposes of this guidance.

a. The term other regulatory authority means any Federal, tribal, State, or local regulatory program other than the Corps Regulatory Program.

b. The term preconstruction notification (PCN) means a notification by an applicant or ORA (See 3.b.(2) & (3)) to the Corps that is required prior to initiation of work by the applicant pursuant to the PGP. The PCN requirements generally include time frames for verification, expiration, coordination, and/or automatic verification (applicants should consider their projects automatically verified under the PGP when the established time frame has passed with no response from the Corps either verifying under the PGP or advising that a Corps standard permit will be required).

c. The term verification means a written response to the applicant from the appropriate Corps district that indicates that a specific project has been authorized by the Corps under the terms and conditions of the PGP. The verification from the Corps will be in response to a request by an applicant or as part of a PGP condition requiring notice to the Corps and Corps verification before the applicant proceeds with a project. The Corps PGP verification procedures should be similar to those found in the Corps nationwide general permit procedures (33 CFR § 330.6), and should state that the proposed project may proceed upon approval under the ORA program subject to the terms and conditions of the PGP, as well as any additional project specific special conditions provided in the Corps verification letter. In some cases it will be appropriate for the ORA to provide an applicant with a copy of the Corps PGP when providing the ORA permit decision.

3. Programmatic General Permit Requirements

a. *PGP criteria:* All PGPs must be designed to meet the following five criteria:

(1) every project authorized under a PGP can cause no more than minimal adverse environmental effects, individually or cumulatively, based on compliance with the terms and conditions of the PGP;

(2) PGP implementation *must* simplify the evaluation process for applicants (preferably through one-stop-shopping) and reduce duplication between the Corps and the ORA, and must not increase the number of standard Corps permits;

(3) a PGP must provide protection for aquatic resources at least equivalent to the overall Corps Regulatory Program (and sometimes will enhance environmental protection);

(4) PGP implementation must not increase the Corps overall workload; and

(5) every project authorized under a PGP must comply with all Federal environmental laws and must ensure that all relevant Federal interests will be protected (e.g., national defense, navigation, endangered species, etc.)

b. *The Corps review of specific permit applications under a PGP may vary.* The Corps, with input from the ORA and the Federal resource agencies, will determine the appropriate level of case specific review and periodic overview regarding implementation of the PGP. Such review and overviews will vary depending on whether the PGP is developed for a broad or narrow ² ORA program. PGPs that are limited in nature and/or developed for narrow ORA programs may not require case specific review (category 1) so that only periodic overview by the Corps would be necessary as discussed in paragraph c. below. On the other hand, for PGPs proposing to cover a broad spectrum of projects, the Corps and ORA should strive to develop a multi-category approach to review and screen projects. The establishment of thresholds in each category may also allow the Corps to "regionalize" some nationwide general permits, including nationwide general permit number 26. The Corps and the ORA should also strive to use the minimal number of categories that are necessary to meet the goals of a PGP (e.g., the North Carolina PGP is established using categories 3 and 4 as described below). The thresholds of each category may vary, based upon

regional factors, statewide factors, watershed factors, existing ORA program evaluations, etc. Some category thresholds may be developed based on the type of project, and others may be developed based on the size of the wetland acreage impact. For new ORA programs, category 1 reviews may not be appropriate until the performance of the ORA has been demonstrated.

(1) Category 1: The first category typically would include those projects that would not require notification to the Corps (e.g., projects involving less than 5,000 square feet of fill within inland waterways or wetlands, including secondary impacts from drainage, flooding, or clearing, as described in the Massachusetts PGP).³ Category 1 must be limited to those projects where it is clear that such projects would result in no more than minimal environmental adverse effects, individually and/or cumulatively. While category 1 thresholds may vary between PGPs, these thresholds should be established carefully so as to ensure that all category 1 projects clearly do not result in adverse environmental effects that are more than minimal after applying the terms and conditions of the PGP and, therefore, require no Federal review.

(2) Category 2: The second category would involve projects that require a PCN to the Corps and/or joint review of applications by the Corps and the ORA (e.g., projects involving impacts near a Federal navigation project). Category 2 projects are those that will result in no more than minimal adverse environmental effects, individually and/or cumulatively, but a PCN will be required to ensure that Corps interests or concerns, including Corps project real estate and navigation issues, are satisfied. Due to the exclusive, Corps-only nature of the concern under review, this category would not involve coordination with the other Federal resource agencies. A time frame, generally 30–45 days, should be established to resolve issues during the review process. For projects that do not pass the Corps and/or joint Corps and ORA screening, a standard permit application to the Corps would be necessary as described in category 4.

(3) Category 3: The third category would involve a PCN to the Corps with Federal resource agency coordination to ensure that the project will result in no more than minimal adverse environmental effects, individually and/

² A narrow program may include authority for a single type of project (e.g., piers, floats, fish ladders, etc.)

³ Examples are illustrative only and most are taken from the existing Massachusetts PGP. Actual limits for each category will vary and be determined during the development process of each PGP.

or cumulatively (e.g., projects involving 5,000 square feet to one acre of impacts within land waterways or wetlands as described in the Massachusetts PGP). The ORA may also screen, during its verification process, for certain Federal interests (e.g., presence of federally threatened and/or endangered species). The ORA can provide this information to the Corps to aid in the Corps determination of compliance with the appropriate Federal law or regulation, and/or the Corps can use the information to coordinate with the appropriate Federal resource agencies. The PCN must also include a process by which Federal resource agency comments will be considered fully during a specified comment period (generally 30–45 days). A provision to allow the Federal resource agencies an opportunity to request review of a specific project (i.e., “kick out”) under the Corps standard permit procedures should be included for category 3 PCN reviews. While Corps districts should consider this an automatic “kick out” requirement for category 3 projects, there may be cases where the Corps and the Federal resource agencies agree that a “kick out” is unnecessary based upon the safeguards afforded by the terms and conditions of the PGP. When requesting a “kick out” on a specific action, the Federal resource agencies must submit, during the PCN, a written rationale of their concerns and recommendations to satisfy those concerns. (The Corps, of course, retains its full authority to require a standard permit for any project, regardless of category.)

(4) Category 4: The fourth category would involve projects that exceed established project and/or acreage thresholds of the PGP or other applicable general permit (e.g., projects involving adverse effects greater than 1 acre within inland waterways or wetlands as described in the Massachusetts PGP). Such projects would require standard permit evaluation by the Corps. Category 4 represents essentially the threshold limits of the PGP and not a category of verification under a PGP.

c. Periodic Overviews: The Corps should conduct periodic reviews of the PGP to determine that the ORA program is continuing to provide environmental protection at least equivalent to that provided by the overall Corps Regulatory Program without the PGP, based upon the terms and conditions of the PGP, and to determine whether any modifications are necessary to improve the implementation of the PGP. The Corps may conduct an annual review of the PGP, may require annual reporting by the ORA of projects approved by the

ORA under its program, or may conduct an overall review prior to expiration of the PGP for consideration in the reevaluation of the PGP for reissuance. This is especially important when an ORA program is new or has not established a performance record. Immediate Corps overview should occur when the ORA modifies its program (e.g., changes in State law, regulations, procedures) prior to the expiration of the PGP, to ensure that the terms and conditions of the PGP will not be affected. Corps overview should ensure that the use of the PGP has resulted in no more than minimal adverse environmental effects to aquatic resources, either individually and/or cumulatively. Overview should generally include a periodic review of a random subset of projects authorized under the PGP that had no reporting requirement to the Corps (e.g., category 1), as well as programmatic review of the procedures and conditions of the PGP. During development of the PGP, the Corps and ORA should determine what information must be collected to facilitate oversight reviews.

d. Compliance with Federal laws:

(1) *Every project authorized under the PGP must comply with all applicable Federal laws, with special compliance review given to those Federal laws related to the Corps Regulatory Program (33 CFR § 320.3).* The Federal laws include, but are not necessarily limited to, the Endangered Species Act (ESA), the Wild and Scenic Rivers Act, the National Historic Preservation Act (NHPA), the Coastal Zone Management Act (CZMA), the CWA, Sections 9 and 10 of the RHA, and Section 103 of the MPRSA.

(2) Projects authorized under a PGP should ensure compliance with Section 401 of the CWA and Section 307 of the CZMA, in accordance with 33 CFR 330.4(c) and 330.4(d), respectively.

(3) The Corps must coordinate with the ORA, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service where appropriate, regarding how the PGP will implement the mandates of the ESA. The Corps must consult with the ORA and the State Historic Preservation Office to ensure that the PGP is issued in compliance with the NHPA. The PGP should be conditioned with the same language found in the Corps Federal Register/Code of Federal Regulations citation regarding the nationwide general permit program for the following three conditions: Wild and Scenic Rivers, Endangered Species, and Historic Properties. Upon the reissuance of a PGP, the Corps will ensure that the current Federal Register/

Code of Federal Regulations citation is used for the three conditions.

e. Public Notice:

(1) The Corps must ensure that the general public has a reasonable opportunity to participate fully in the development and re-evaluation of every PGP through our procedures in 33 CFR Part 325.

(2) The PGP must also ensure that interested members of the public are given notice of projects to be authorized by the Corps under the terms and conditions of the PGP, so that their comments can be submitted to the ORA and/or to the Corps. Specifically, the ORA must have, or establish, a reasonable public notification process for projects to be authorized by the Corps under the PGP. While it does not have to be identical to the Corps public involvement process, the ORA procedures cannot have the effect of substantially reducing the ability of the public to participate in the regulatory process, in comparison with the public notice and comment procedures provided by the Corps Regulatory Program without the PGP.

The PGP may also be developed for projects where the ORA has established a “general permit program or exemptions”, so long as the ORA has provided an opportunity for the public to participate in the original development, and periodic re-evaluation of the ORA general permits or exemptions.

f. Consistency with other General Permits: One objective of PGPs is to reduce the complexity of the Corps Regulatory Program. In this regard, it may be appropriate to suspend or revoke some or all of the existing nationwide or regional general permits when the projects authorized by such Corps permits will be covered by the PGP.

g. Enforcement: The Corps, subject to the discretion of the district engineer, will enforce project specific special and general PGP terms and conditions to ensure that requisite environmental and public interest safeguards are met. The Corps may develop procedures with the ORA for the resolution of noncompliance of projects authorized by the Corps under a PGP.

4. This guidance expires (pending), unless revised sooner or rescinded.

For the Commander:

signature pending

Stanley G. Genega,

Major General, USA, Director of Civil Works.
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