



Massachusetts Association of Conservation Commissions

protecting wetlands, open space and biological diversity through education and advocacy

September 12, 2014

Mr. Greg Penta
U.S. Army Corps of Engineers, New England District
696 Virginia Road
Concord, MA 01742-2751

Via Email: Gregory.r.penta@usace.army.mil

Re: Proposed Department of the Army New England General Permits for Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont

Dear Mr. Penta:

These are the comments of the Massachusetts Association of Conservation Commissions (MACC) on the Proposed Department of the Army New England General Permits for Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

MACC is a nonprofit corporation, established in 1961 and incorporated in 1978, dedicated to supporting the 351 municipal conservation commissions in Massachusetts and protecting natural resources throughout Massachusetts. We represent more than 2,000 conservation commissioners charged with protecting the natural resources of their communities under the Conservation Commission Act (G.L. c.40, §8c) and with administering and enforcing the Massachusetts Wetlands Protection Act (G.L. c.131, §40). We seek to promote strong, workable, science-based laws, regulations, and policies that protect wetlands, other water resources, and open space.

We appreciate the opportunity to comment on the proposed New England General Permits (NE GPs).

As explained in the Corps public notice dated June 13, 2013, the Corps New England District is reevaluating its long established GP program. More specifically, the Corps is seeking comments on its proposal to replace the six New England state GPs with a consolidated regional NE GPs. It is the Corps belief that consolidating the individual state GPs into a regional NE GPs will result in a more efficient and streamlined review process while continuing to maintain a high level of environmental protection, reducing regulatory redundancy, ensuring consistent compliance with national policy, and alleviating an administrative burden for Corps staff, which currently must reissue each of the six GPs every five years. The Corps has further indicated that the proposed NE GPs will not result in significant substantive changes to how activities in waters of the U.S. are regulated in the New England states.

The focus of our comments is on the sections of the NE GPs that are particularly relevant to the Commonwealth of Massachusetts and what effects, if any, the proposed changes might have on the ability of the Corps to regulate and protect waters of the U.S., including wetlands. As the Corps is aware, many activities that are proposed to be conducted in waters of the U.S. are also subject to review and approval by conservation commissions under the Massachusetts Wetlands Protection Act and local wetland bylaws and ordinances. There is an inherent underlying link between local, state, and federal

wetlands regulatory programs when it comes to protecting wetlands in the Commonwealth and the functions and values they provide. This point is reinforced and strengthened in Section I(2) (General Criteria), proposed revisions to General Condition 1 of the NE GP and proposed Appendix IX (State Specific Supplement) which requires (in part) that “Permittees must obtain other Federal, state, or local authorizations required by law ...” to be eligible for coverage under the NE GPs.

To facilitate your review we have organized our comments by the relevant proposed NE GPs General Conditions or specific NE GPs section headings, each of which are discussed in further detail below.

Section I. General Criteria

Self-Verification Form

The proposed 2-page Self-Verification (SV) form replaces the 1-page “Appendix C: Category I Notification Form” that has been in effect since 2010 with only minor revisions. The proposed SV form requires additional qualitative detail regarding potential secondary effects, state permit information, wetlands/vernal pool consultant contact information, a breakdown of temporary and permanent wetland impacts, identification of applicable activities for which coverage is being sought and a stronger affidavit certification statement. The Corps also indicates that the SV form can be submitted electronically. We endorse these proposed changes as it requires greater accountability and consideration of permit compliance details by the permittee and its representatives before work is initiated in regulated areas.

One minor request for clarification: The SC form provided in Appendix VII indicates (in part) that the form shall be submitted “at least two weeks before work commences ...”, whereas Special Condition 30 simply indicates that the SV form shall be submitted “before starting work.” We recommend that Special Condition 30 be revised to be consistent with Appendix VII. We also recommend that the Corps clarify if the form shall be submitted before the general start of work or perhaps more appropriately before the start of work in regulated areas.

We have no substantive comments on the proposed Pre-Construction Notification (PCN) application requirements as they essentially mimic the Category II screening / written authorization process that is currently in place.

Section III. Eligible Activities

This section of the NE GPs proposes to replace “Appendix A: Definition of Categories” in the current GP. From what we can infer, the Corps has clarified the relationship between direct permanent and temporary wetland impacts and the assessment and quantification of secondary effects relative to determining if an activity is eligible for SV, PCN, or an Individual Permit (IP). This is particularly true for projects previously reviewed under Category I (non-reporting) or Category II of the current GP. The key wetlands impact review thresholds appear to remain intact for non-tidal resources including Special Aquatic Sites (e.g., salt marsh, vegetated shallows, etc): 0 to 5,000 s.f. (SV); 5,000 s.f. to 1 acre (PCN); and > 1 acre (IP). Similarly, the review of work in tidal waters has not substantially changed when compared to the current GP. We support these changes provided there is no “relaxation” of the review thresholds. The current thresholds mesh well with the Wetlands Protection Act regulations and state 401 Water Quality Certification processes, which results in a more comprehensive and efficient review process.

Review of General Permit

With only a few exceptions, the majority of the information and criteria included in the proposed General Permit appears to be consistent with the Appendix A requirements and General Conditions in the current GP; the information has been reorganized into eligible activity-specific categories similar to the Corps Nationwide Permits program. Ideally this approach will streamline federal and related state regulatory programs and allow the Corps to adequately assess cumulative impacts of permitted activities. We offer the following comments and observations for your consideration:

GP15. Reshaping Existing Drainage Ditches – This is a new activity that is not specifically described in the current GP. We infer that the intent of this GP is to allow greater flexibility to local public works departments and state highway departments to maintain existing drainage ditches for the purposes of improving the water quality and flood control functions of these types of wetlands. A SV threshold of ~500 linear feet of “reshaped” drainage ditch is allowed under the proposed GP 15. Although we do not take issue with the spirit or intent of the GP 15 (*i.e.*, to make it more efficient for agencies to secure approvals in order to maintain jurisdictional waterways that were specifically constructed to collect and treat stormwater runoff), we are concerned that the current wording of the GP is too general and does not establish controls or prescribe BMPs to insure that impacts to wetlands are no more than minimal. For example, many drainage ditches have wetlands located on either side of their banks and any re-grading to incorporate gentler slopes could result in permanent wetland impacts in excess of SC thresholds with no requirement for compensatory mitigation. We note that the “Area Limits” identified under Section II., Eligible Activities do not apply to GP 15 (see Section III, para. 2). Eliminating wetlands in order to create “gentler slopes” within the drainage ditch may not result in improved water quality conditions, the stated purpose of this GP. Also, the term “drainage ditch” is not specifically defined in the NE GP and could presumably include streams with established TOY restrictions under GP 18. There are no references to construction techniques, stockpiling, dewatering, re-plantings and/or slope stabilization BMPs – all of which contribute to improved water quality function but which are not considered under the proposed GP 15. We believe that GP 15 in its current form does not sufficiently ensure that wetland impacts are no more than minimal. We respectfully encourage the Corps to re-work GP 15 with additional BMP details, restoration requirements, and prescriptive review thresholds beyond a simple linear measurement of 500 feet. At a minimum we recommend that a footnote be added to GP 15 indicating that “Applicants are encouraged to contact the Corps with questions on whether an activity qualifies for GP 15 or not” (similar to the footnote provided in GP 1) OR provide cross references to Section III (area thresholds for discharges of fill in wetlands) and related General Conditions and Activities specified in the NE GPs that would add clarity.

Review of General Conditions

General Condition 1 – Other Permits: As noted above there is an inherent underlying link between local, state, and federal wetlands regulatory programs when it comes to protecting wetlands in the Commonwealth and the functions and values they provide. This point is reinforced and strengthened in Section I(2) (General Criteria), proposed revisions to General Condition 1 of the NE GPs and proposed Appendix IX (State Specific Supplement) which requires (in part) that “Permittees must obtain other Federal, state, or local authorizations required by law ...” to be eligible for coverage under the NE GPs. We recommend that this General Condition be expanded to mention applicable local wetlands bylaws and ordinances.

General Condition 4 – Mitigation (Avoidance, Minimization and Compensatory Mitigation): This General Condition replaces General Condition 15 in the current GP. To be eligible for SV, the proposed General Condition requires project proponents to more thoughtfully consider the preservation of riparian/forested buffers and low impact development stormwater management techniques in their design. The Corps has also provided a link to specific guidance documents that applicants are required to review and consider before certifying the SV form. For perspective, much of the analysis being required by the Corps is consistent with the Wetlands Protection Act regulatory program relative to avoiding and minimizing impacts to Riverfront Area, compensatory mitigation measures and designing a stormwater management system that complies with current state standards. For these reasons we support the strengthening of this General Condition and the inclusion of the guidance documents provided by the Corps.

General Condition 12 – Pile Driving and Removal: Pile supported structures were generally covered under Appendix A of the current GP. With the proposed NE GPs the Corps has created a new General Condition which specifically requires the removal of derelict, degraded or abandoned piles in navigable waters under certain prescribed circumstances. The proposed General Condition 12 also prescribes greater detail on pile installation and removal techniques, measures to avoid or minimize impacts to fisheries, and noise level criteria based on current science. We support the inclusion of this General Condition and the criteria referenced therein as it will contribute to the protection of fishery and marine mammal resources, particularly for projects that do not result in a discharge and/or are eligible for SV in navigable waters under proposed GP 3.

General Condition 16 – Restoration of Special Aquatic Sites: General Condition 16 prescribes criteria to restore Special Aquatic Sites in tidal and non-tidal wetlands and expands upon the wetland restoration BMPs referenced in the current GP. It includes a simple and reasonable field test to determine if restored topsoil conditions meet the identified standard. GP 16 strengthens / reinforces the wetland restoration requirements for SV eligible projects and would contribute to the protection of the functions and values provided by freshwater and tidal wetlands in the Commonwealth. We therefore support the inclusion of this General Condition and the criteria referenced therein.

General Condition 17 – Soil Erosion, Sediment and Turbidity Controls: This General Condition replaces General Condition 19 in the current GP. To be eligible for SV, the proposed General Condition requires project proponents to consider a greater variety of erosion control devices / BMPs to protect waters of the U.S. during construction including those that are biodegradable and minimize impacts to wildlife. This approach towards selecting appropriate site specific BMPs is consistent with the information provided in MACC's *Massachusetts Runoff, Erosion & Sediment Control Field Guide* and MassDEP/USEPA NPDES erosion control guidance documents. We support these proposed changes as they would contribute to the protection of wetlands and water bodies and their ability to function from a storm damage and flood control perspective.

To our knowledge the Corps has for the first time prescribed specific water quality monitoring criteria for activities involving the removal of certain non-embedded management techniques during a time-of-year restriction. We recommend that the requirement to monitor turbidity during removal of controls be based on existing background conditions in the immediate vicinity of proposed work at the time of removal not "pre-removal conditions" (or otherwise clarify the intent of the General Condition).

General Condition 18 – TOY Work Windows and Restrictions: As the Corps may be aware, the Massachusetts Wetlands Protection Act regulations, state 401 Water Quality Certification regulations,

and Chapter 91 regulations prescribe to varying degrees time-of-year (TOY) restrictions for both tidal and non-tidal rivers and streams. This is particularly true for anadromous / catadromous fish runs. The proposed General Condition 18 requires permittees to adhere to the TOY restrictions referenced in the Massachusetts Division of Marine Fisheries (MassDMF) technical publication unless otherwise modified by the MassDEP or the local Conservation Commission upon consultation with the MassDMF or MassDFW. Work in any non-tidal stream that is not currently listed in the aforementioned MassDMF publication is restricted during the period of September 1 through June 30 unless otherwise modified in writing through consultation with the MassDMF and MassDFW. We support the proposed changes as they would contribute to the protection of fisheries in the Commonwealth's rivers and streams.

General Condition 19 – Aquatic Life Movements & Management of Water Flows: This General Condition, along with GP 10, largely replaces General Condition 21 in the current GP. The previously referenced “Massachusetts River and Stream Crossing Standards” has been replaced with a new document entitled “Stream Crossing BMPs” and the source documents referenced therein. The MassDEP and local Conservation Commissions primarily rely upon the “Massachusetts River and Stream Crossing Standards” document when reviewing projects under the Wetlands Protection Act or 401 Water Quality Certification programs. It appears that the BMP document proposed by the Corps is largely consistent with the key elements of the stream crossing standards document with regard to bankfull width, openness ratio, embedded depths, bottom substrates and other similar criteria with no substantive changes proposed. We believe that in most instances requiring project proponents to adhere to the stream crossing standards results in fewer impacts to wetlands and water bodies and greater protection for fish and wildlife passage and river continuity. We encourage the Corps to continue to require applicants to adhere to the stream crossing standards on a case-by-case basis as is currently proposed in the NE GPs but recognizes that there is not a “one size fits all” design for every type of stream crossing including smaller intermittent and ephemeral streams. At a minimum, we recommend that a footnote be added to GP 19 indicating that “Applicants are encouraged to contact the Corps with questions on whether the stream crossing BMPs apply to a particular activity or not” (similar to the footnote provided in GP 1).

General Condition 21 – Floodplains and Floodways: We support inclusion of General Condition 21 in the NE GPs. To be eligible for coverage under the NE GPs this condition essentially requires that project proponents avoid and minimize impacts to the 100 year floodplain and provide compensatory flood storage where appropriate. These measures are consistent with the general performance standards of the Wetlands Protection Act regulations for land subject to flooding and would contribute to the protection of flood control and storm damage prevention functions that wetlands provide.

General Condition 24 – Vernal Pools: The protection of vernal pools is a critical component of environmental protection and an important subject to conservation commissions and us. Certified Vernal Pools are regulated as Outstanding Resource Waters (ORWs) under the state 401 Water Quality Certificate regulations and are afforded greater protection when located in certain wetland resource areas under the Wetlands Protection Act. Small isolated wetlands, including vernal pools, often located in sensitive headwater areas, are not often adequately protected under existing local, state and federal wetlands regulations. Many of these areas are extremely important wildlife habitat, and typically provide all or most of the same habitat functions as Bordering Vegetated Wetlands.

Review thresholds and criteria for work in or near Vernal Pools were previously described in Appendix A of the GP. With the NE GPs the Corps is proposing to incorporate these criteria as a new General Condition 24 - We are pleased that the Corps has retained the concepts of Vernal Pool Depression,

Envelope, and Critical Terrestrial Habitat and the view that impacts to these critical zones should be avoided and minimized to the maximum extent practicable. Vernal pool-breeding amphibians depend upon both the VP and surrounding envelope and critical terrestrial habitat for survival. The Corps has also retained the reference documents in support of its position that these areas should be regulated under the Clean Water Act when there is a discharge of dredged or fill material into waters of the U.S., along with a new reference summary document entitled "Vernal Pool BMPs." Collectively these reference documents prescribe reasonable and workable conservation recommendations to avoid or minimize potential impacts to vernal pools and their adjoining habitats. A greater emphasis is placed in the summary document on the preservation of directional corridors consisting of unfragmented forest with at least a partly-closed canopy to provide shade, deep litter and woody debris minimizing impedance to amphibian terrestrial passage. As the Corps points out, directional corridors are a management tool that allows a flexible approach to conserving pool-breeding amphibian habitat and provide an alternative to circular zones, which often do not meet the terrestrial habitat needs of Vernal Pool species. The proposed General Condition also provides necessary clarifications regarding the scope of the study area (on site and off site) that project proponents are required to evaluate for the presence of vernal pools when designing and laying out a project. Lastly, the Corps has clarified the SV vs. PCN review threshold when there is a discharge of dredged or fill material in a water of the U.S. and a Vernal Pool is located within 500 feet of the regulated activity. For perspective, the prior Category II review threshold (now PCN review threshold) was automatically triggered when there was a discharge of dredged or fill material in a water of the U.S. and any of the following occurred:

- Any work in the Vernal Pool Depression;
- Any work, including roads and driveways, in the Vernal Pool Envelope;
- Any work that individually or cumulatively impacts >25% of the Vernal Pool Critical Terrestrial Habitat (in part).

It is not clear that the proposed review threshold in the NE GPs will materially affect how work in or near Vernal Pools is regulated by the Corps because the SC / PCN review thresholds and avoidance and minimization measures have essentially been incorporated into the conservation recommendation documents. Provided this holds true, we have no objection to the revised review threshold criteria and greater attention paid to preserving directional corridors and terrestrial passage ways.

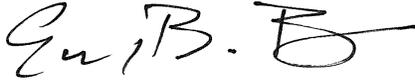
Additional Comments

As noted in the NE GPs, general permits are required to result in no more than minimal direct, secondary, and cumulative adverse impacts to waters of the U.S. That is a critical legal requirement for general permits. To our knowledge, the Corps has not indicated when and how it will undertake that evaluation of impact. Because that evaluation is a key determinant of whether the NE GPs is successful, we strongly recommend that the Army Corps include in the NE GPs, or the Federal Register notice when it promulgates the permits, a timeline for such evaluation and at least a conceptual approach for how it will evaluate direct, indirect, and cumulative adverse impacts.

The NE GPs will rely on self-verifications and written reports from persons operating under the GPs. The GPs, however, do not mention anything about the consequences of non-compliance or providing incorrect or incomplete information. We think the GPs should include a brief notice or explanation of those consequences, such as Corps enforcement options and a citation to the enforcement regulations.

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Eugene B. Benson". The signature is fluid and cursive, with a prominent initial "E" and "B".

Eugene B. Benson
Executive Director
Email: eugene.benson@maccweb.org

Copy: MACC Board of Directors