

State Programmatic General Permits

*(A Cautionary Tale
to Enhance Dialogue)*

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per year out of 6,000 for all of the New England states' SPGPs combined. In the late 1980s Chris Godfrey, Regulatory Division Chief at the New England District (Corps), and Ken Kettenring, who was the NH Wetlands Bureau Administrator at the time, began to think about ways to streamline the permitting process to eliminate duplication of effort, confusion for the applicant and improve compliance. Their initial proposal for a SPGP raised concerns at EPA and USFWS over whether it would be protective enough, but when Kettenring suggested revoking the nationwides in New Hampshire and putting an SPGP in their place the agencies became active participants in its development. According to Kettenring, the New Hampshire's Attorney General's office also provided strong support both in working with the legislature to help make supportive changes to the NH statute and in providing enforcement assistance in and out of the courtroom to improve compliance.

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authorizations are processed within
30-60 days



Jeanne Christie photo

Cape Cod, MA April 2008

Once upon a permit...

In 1992, New Hampshire became the first state to be issued a new kind of state programmatic general permit (SPGP). It was the first time that the Corps and a state created a comprehensive permit and revoked all of the nationwide permits for that state. This became an effective permitting tool for New Hampshire, which deals with about 1,500 SPGP authorizations

Terms used:

Programmatic general permit (PGP) – a type of regulatory permit issued by the U.S. Army Corps of Engineers which authorizes states, local governments, tribes, or other federal agencies with regulatory programs comparable to the Corp's Section 10 or 404 program to issue permits for specified activities in lieu of direct Corp's issuance of such permits

State programmatic general permit (SPGP) – a type of PGP that is administered by a state agency and designed to eliminate duplication of efforts between Corps districts and states, as well as to make the permitting process more efficient with flexibility as to the geographic region covered and whether nationwide permits are revoked

Regional general permit (RGP) – a type of PGP that is issued by Corps with certain conditions that pertain to a limited (regional) geographic area; it can be used to modify or in place of nationwide (the role of the state varies)

General Authorization (GA) – a type of permit that is issued by a state for specific types of minimal impact projects, for example, Oregon's GA

http://www.oregon.gov/DSL/PERMITS/ga_trainsinfo.shtml

The response from the public was very positive. The SPGP made it easier for the regulated community to comply and therefore increased compliance. The people who followed the law benefited from the reduced paperwork, improved consistency and timeline provided by the new SPGP. Prior to issuance of the SPGP regulators worried that violations occurred because it was easier to pay the NH fine of \$5,000 than attempt to comply with a slow and confusing permitting program. With the launch of the new SPGP program, the fine for noncompliance was increased to \$10,000 (per day of violation) and this helped put all applicants on equal ground. It also reduced the Corps' workload because they only saw the applications that passed through NH's screening process, allowing the Corps to focus on the big projects and in some cases, these major impact projects required individual permits.

NH and the Corps continue to seek opportunities to further reduce duplication. The Corps and the states have different databases, Godfrey explained, so there is still some duplicate bookkeeping. This will change in the future, however, when the Corps launches a new database, she said. The regulated community benefited because permittees apply once to the state and receive the benefit of the federal approval process for activities covered by the SPGP. Ninety percent of the NH-SPGP authorizations are processed within 30-60 days. During the screening process for each application, the state's Fish & Game staff use a geographic information systems (GIS) mapping layer to identify any overlap with endangered species sites. Because of this layer and state laws, there were no Endangered Species Act (ESA) related conflicts in designing the NH-SPGP. After fifteen years the NH-SPGP has received its third renewal and is considered one of the strongest examples of an SPGP in the country.



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Laws on the Threshold – Authorizing Impacts to Aquatic Resources

Clean Water Act (CWA) Section 404(e) authorizes the U.S. Army Corps of Engineers (Corps) to issue nationwide and regional permits, as well as general permits on a state level for small projects that somehow alter aquatic resources. Programmatic General Permits (PGPs) are designed to work within state and regional regulatory programs. These comprehensive permits are administered jointly by a state and the Corps, with a streamlined process for the public. One type of PGP is the state programmatic general permit (SPGP). The purpose of an SPGP is to ensure a timely issuance of permits while obeying state and federal wetland laws and regulations. State agencies administer SPGPs, which are reviewed and reissued every five years by the Corps district and with input from other federal agencies (EPA, USFWS, NMFS, etc.), the state and the public. Federal review of activities authorized under SPGPs is triggered by acreage impacts, otherwise known as thresholds. These authorizations are issued to applicants for small projects with minimal impacts.



Bridie McGreavy of Lakes Environmental Association (LEA) in Bridgton, ME netting aquatic life in a vernal pool.
Jeanne Christie photo

SPGPs are designed to avoid duplication of efforts between the Corps and the states. The Corps uses the permit authority (Section 404(e) of the Clean Water Act, Section 10 of the Rivers and Harbors Act, and Section 103 of MPRSA) to issue statewide permits that are “piggy-backed” onto existing state wetland permitting programs. (Kusler, ASWM, 1994) For further information, see “Addressing the Gaps: A Federal, State, Local and Tribal Partnership for Wetland Regulation,” Jon Kusler, PhD, Esq., ASWM (2004) http://aswm.org/pdf_lib/statepartnership.pdf

Beginning with the New England District in the early 1990s, the Corps decided to structure the permit reviews based on impact categories and to work more

closely with state regulatory programs. In New England the SPGPs cover minimal impact projects and the PGP program has been very successful.

(Godfrey & Barry, Engineer Update, 2001) When applicants file for a project with a state agency in Maine, New Hampshire, coastal Connecticut, and Rhode Island, it usually appears to the public as though only the state is involved—unless the Corps needs to request additional information. If this happens the project is elevated to a Section 404 individual permit because of concerns that impacts will be more than minimal. During this transparent screening process, the state determines the level of impact and thus, under which category, each permit application will be reviewed. The Corps is then involved with the permit review process and meets regularly with the state regulatory staff as well as those from NOAA-Fisheries, USFWS and EPA to review the applications and check for the need for

mitigation or an individual permit. The New England District issues only about one hundred individual permits each year. In Massachusetts and inland Connecticut, applications go to the Corps but impacts in the nonreporting category are addressed by the state through the local Conservation Commissions or Inland Wetland Commissions, explains Ruth Ladd, Chief, Policy Analysis and Technical Support Branch Regulatory Division, New England District. In Vermont, the state program is too different from the Corps’ to have a PGP but there is a Regional General Permit, which has a similar format to the SPGPs but does not defer responsibility for any of the Section 404 program to the state.



Jeanne Christie photo

Plum Island, MA, April 2008

Henceforth we shall revoke the nationwides...in some cases

New Hampshire’s was not the first *ever* SPGP. The NH-SPGP was the first to include the act of revoking some or all of the nationwides effective in that state. Technically, a different version of an SPGP was already in place in Maine and Connecticut in the early 1990s but that earlier SPGP was applied in addition to the nationwides.

Massachusetts was second to get the new kind of SPGP in 1993, followed by Maine in '95, Connecticut in '96, Rhode Island in '97. Currently all of the New England states—except Vermont—have SPGPs. “Without the PGPs, [the Corps] would have a project backlog,” according to Godfrey. It allows more staff time for other projects related to mitigation, enforcement and new initiatives such as developing the regional supplement to the delineation manual. The PGPs and the efficiency of the SPGP program have allowed the New England district to issue permits in a timely manner and devote staff resources to other projects that would not otherwise be accomplished. “Each time an SPGP comes up for renewal, the Corps district assesses activities that should be included in the SPGP and/or expresses concern about too much impact [as caused by] certain activities.” For example, “the Corps is adding activities that have impacts on vernal pools to the SPGPs that need Corps and agency review in the New England states,” Ladd said.

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Pennsylvania’s SPGP (PA-SPGP) was jointly developed by the Department of Environmental Protection (DEP) and the Corps. “Since the DEP’s Chapter 105 Dam Safety and Waterways Management rules and regulations are generally consistent and comparable to the federal Section 404 Program, actions approved under the Chapter 105 process generally meet federal requirements as well. In most instances, the PA-SPGP is authorized by the DEP with an approved Chapter 105 water obstruction and encroachment permit. In about 20% of the permit applications the U.S. Army Corps of Engineers (Corps) still performs an independent permit review before authorizing the use of the PA-SPGP. The Corps reviews are mainly due to minor differences in regulatory authority or the scope of the project,” according to Ken Murin with Pennsylvania DEP. Among the several benefits of the PA-SPGP, it reduces administrative burden for applicants; improves regulatory response time; improves regulatory predictability; reduces applicants’ need to duplicate information; and allows for workload sharing by the regulated community.



The state of Florida began to look into 404 assumption in the 1980s. By the early 1990s, EPA had awarded Florida a development grant to relook at the benefits and limitations of 404 assumption and a possible SPGP. Among the limitations the state identified were the Section 10 unassumable waters (Rivers and Harbors Act), which make up over half of the wetlands and waterways in Florida. This made the process of the state assuming regulatory authority more complicated; consequently the state took advantage of the SPGP idea, starting with a pilot in four counties within the Jacksonville Corps district in 1997. The Florida SPGP was modeled after the New England SPGP. Florida designed it so that the SPGP covered four project types; these were shoreline stabilization, boat ramps/launches, docks/piers, maintenance dredging of canals and channels. Four fifths of the state is covered by the

state's Environmental Resource Permit (ERP) program; ERP is a much bigger permit (application) than a Corps Section 10. The SPGP was never implemented in the Florida panhandle. The SPGP has been well-received by the state agency and regulated community, which deals with about 4500 individual activities under the SPGP per year. The SPGP-III was an expanded version that covered additional types of activities but was later scaled back to the four project categories after a manatee law suit—along with a much more stringent manatee key that was applied along with a number of additional kick-outs. For more information, go to:

http://www.dep.state.fl.us/water/wetlands/forms/spgp/SPGP_IV_Attachment_2-ManateeKey2005.pdf

As a result of the manatee law suit, the Corps revisited the SPGP and removed dock permitting under the SPGP-III. This change was not particularly well-received by the regulated community. The FL-SPGP is currently in its fourth version.



Making Peace with Dragons, or Other Endangered Species

One potential hurdle for a state when developing, or revisiting, an SPGP, is the Endangered Species Act (ESA). According to Jim Stoutamire with the Department of Environmental Protection, “Listed species are an issue for both assumption and an expanded SPGP. If [the state] pursued assumption [and keeping] in mind that Florida has many ESA listed species, the state would have to have an equivalent level of protection. If Florida pursues an expanded SPGP, the state is not prepared to take on the workload of ESA review/consultation nor are we interested in subjecting applicants to ESA section 10 consultation.” The state would “prefer a middle road that would suspend the state permit review time clock to allow Federal ESA consultation to occur under ESA section 7 between the COE/USFWS and then return the file to Florida for environmental review under the SPGP,” explained Stoutamire.



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Oregon *had* an SPGP in 2006 but suspended it only nine months later. What happened? The state began simultaneously to pursue an SPGP and look into state assumption, but when assumption got moved to the back burner, it focused on the SPGP. But there was a big obstacle to the SPGP: compliance with the Endangered Species Act (ESA) and protection of salmon in particular presented a challenge, according to Eric Metz with the Department of State Lands. Oregon Department of State Lands (DSL) had to make sure the SPGP would meet many requirements upfront and on all potential impacts, which could not be quantified. This meant adding another loop in the SPGP process for applicants, on top of satisfying a host of other comments and criticisms expressed by other state and federal agencies that review Corps permits. It also spelled more paperwork. Instead of streamlining the permit process, the SPGP complicated it, Metz said. Despite the good intentions of including all of the ESA and other federal and state program requirements—a kitchen sink approach—it became unworkable.



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Another problem was a lack of collaboration in the beginning of the SPGP's development. While the SPGP was still under development, the services, U.S. Fish & Wildlife Service and National Oceanic and Atmospheric Administration (NOAA)-Marine Fisheries Service, were not on board with it. The agendas were relevant to losing veto authority for individual activities. The Portland District (Corps) had concerns about handing over regulatory authority and the effect of the SPGP on their own workload. Nevertheless the OR-SPGP model was considered unique at the time it was issued because DSL had consulted successfully with USFWS and NOAA-Marine Fisheries Service under Section 7 of ESA.

“Instead of streamlining the permit process, the SPGP complicated it.”

--Eric Metz of Oregon Department of State Lands

Oregon DSL's SPGP was driven by the resource managers, not the customer (applicant/public) and so it is not surprising to learn that it was not well received by the public. Finally DSL staff recommended that the Corps district suspend the SPGP.

Following suspension of the SPGP, the state and Corps district have identified new opportunities for collaboration. Currently DSL's streamlining efforts entail collaboration with the Portland District on getting the state and federal authorization mechanisms into alignment, rather than attempting to use a state authorization to completely replace a federal authorization. So far, this model has been working very well for authorizations to enhance salmon streams through the placement of large wood and boulders. DSL anticipates expanding this approach to include other activities as well, Metz explained.

A Quest for the Key to Streamlining Regulatory Programs

Depending on the types of activities covered by an SPGP, there is a range of benefits as well as challenges to a state agency and the regulated community. Among the possible benefits, an SPGP may reduce unnecessary paperwork by eliminating duplicate efforts of both the state and Corps district. It may also increase certainty and timeliness, ensure resource protection and improve compliance from a consumer relations standpoint. But it depends on the types of activities covered in the permit, the level of support and collaboration with other agencies and partners, as well as how an SPGP fits into existing wetland regulatory programs and “gets along” with other laws, e.g. ESA.



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SPGP programs may be implemented gradually. A state may start with a pilot program in a single watershed, or a few counties within a Corps district, as happened with Florida's pilot program in 1997. The Corps has emphasized that, “one of the key benefits of SPGPs is the flexibility they afford the states in terms of the projects regulated and the geographical scope of regulation,” (Oppenfeld, ABA Wetlands Law & Policy, 2005)



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In a 1996 regulatory proposed guidance letter, the Corps states that an SPGP must meet five minimum criteria:

1. “Every project authorized under an SPGP can cause no more than minimal adverse environmental effects, individually or cumulatively, based on compliance with the terms and conditions of the SPGP;
2. SPGP implementation must simplify the evaluation process for applicants and reduce duplication between the Corps and the states, and must not increase the number of standard Corps permits;
3. An SPGP must provide protection for aquatic resources at least equivalent to the overall Corps Regulatory Program;
4. SPGP implementation must not increase the Corps overall workload; and
5. Every project authorized under an SPGP 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.” [list adapted from Chapter 10, Wetlands Law & Policy edited by Connolly, Johnson and Williams, ABA, 2005 Ed.]

States and the Corps districts jointly develop the SPGPs and determine the procedure for case-by-case reviews as needed. An SPGP that is limited to a few types of activities, or is specific to a state program, is unlikely to require Corps oversight. The proposed guidance offered a model with a few different categories

<http://www.epa.gov/owow/wetlands/pdf/spgp.pdf> In New Hampshire, for example, these three categories translate to, “minimum, minor and major” impacts. What are some examples of impacts/activities that might be covered under an SPGP? Under the Massachusetts SPGP (MAPGP), there are three categories for activities. Category 1 is for nonreporting (means that it does not require Corps oversight); Category 2 is for reporting, which means

that it is screened first by the state and reviewed by the Corps, USFWS, EPA, and National Marine Fisheries Service (NMFS); Category 3 is reserved for major impacts, which could be greater than 1 acre (in MA, CT, VT, and RI; 3 acres in NH and ME) of impacts to aquatic resources, and would require an individual permit.

Types of activities covered by an SPGP might include fill, bank stabilization, dredging, moorings, repair or maintenance of fill projects. In Pennsylvania, for example, permit applications for projects that will have impacts to wetlands, streams, rivers and other waters will be reviewed by the PA Department of Environmental Protection (DEP) or conservation district. If a project falls under the SPGP’s Category 1 for minimal impacts (nonreporting), it may be authorized by the state without being forwarded to the Corps for comment. If a project falls under the PA-SPGP’s Category 2 for minor impacts (screened/reporting), then the notice of the project is published in the state bulletin for public comment and it is forwarded to the Corps for review. The third tier of project applications are forwarded to the Corps; these projects have impacts that exceed 1 acre of wetlands or 250 feet of streams, among other conditions. The Corps then decides if the project qualifies for a PA-SPGP-3 or if it requires an individual permit. If a project has potential impacts to major water bodies such as rivers and creeks, the project does not qualify under the SPGP and the applicant is then required to obtain authorization through an individual permit. The PA-SPGP is in its third installment.

The advantage is that states may tailor the PGPs to suit their needs and streamline the permitting process for the regulated community.

Virginia is currently working on minor changes to its 2007 SPGP and the accompanying Standard Operating Procedures (SOPs), according to Dave Davis, Director, Office of Wetlands & Water Protection at the Virginia Department of Environmental Quality (DEQ). The original VA-SPGP, developed in 2001, was not as efficient as it could have been due to the Corps involvement in most reviews, leading to confusion among the regulated community and delays in permitting. The 2007 SPGP resolved these major issues and current revisions will address more minor coordination and business process concerns. The Corps and DEQ have worked well together during the SPGP revision process, and hold bi-monthly video conference calls to discuss programmatic items and specific permitting or enforcement cases. On the compliance and enforcement end, the state wetlands division is the lead agency, although they do turn over their findings to the Corps district. On any potential violations, both the Corps and the state investigate independently. But with the modified language in the SPGP, there is more certainty for the regulated community as well as improved collaboration and communication between the state and Corps district.



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Programmatic general permits vary in type—they can cover activities state-wide or in limited geographical regions, e.g. coastal. In some cases the nationwide permits are partially or completely revoked and replaced by the PGPs. The advantage is that states may tailor the PGPs to suit their needs and streamline the permitting process for the regulated community. “Though the flexibility of the SPGPs may result in some inconsistency in enforcement between states, SPGPs ultimately may be better at protecting wetlands because a state is likely to have a more thorough understanding of local issues and wetland areas than the federal government does,” (Oppenfeld, Wetlands Law & Policy, 2005). They make good business sense. Below are links to various PGPs around the country, information about their regional permit programs and SPGPs, where applicable.

Links to Programmatic General Permits

Alabama – SPGP, RGP

<http://www.sam.usace.army.mil/RD/reg/regional.htm>

Alaska – RGP

<http://www.poa.usace.army.mil/reg/gps.htm>

Regional General Permits (RGPs), State Programmatic General Permits (SPGPs)

Arkansas – RGP

<http://www.swl.usace.army.mil/regulatory/regionalpermits.html>

HI – Beach nourishment

<http://www6.hawaii.gov/dlnr/occl/nourishment.php>

PA – SPGP

<http://www.nap.usace.army.mil/cenap-op/regulatory/spgp.html>

<http://164.156.71.80/VWRQ.asp?docid=0442d740780d00000000086800000868&context=2&backlink=WXOD.aspx%3d0442d740780d00008000085600000856%26ft%3d1>

CA – RGPs

http://www.spl.usace.army.mil/regulatory/current_RGPs.htm

CT – SPGP and other permit info fact sheets

<http://ct.gov/Dep/cwp/view.asp?a=2709&q=324222#GeneralPermits>

Delaware SPGP-18

<http://www.nap.usace.army.mil/cenap-op/regulatory/spgp18.pdf>

DE SPGP-20

<http://www.nap.usace.army.mil/cenap-op/regulatory/spgp20.pdf>

Illinois – RGP

<http://www.lrc.usace.army.mil/co-r/modified4webRPPfinal.pdf>

Maine General Permit

<http://www.nae.usace.army.mil/reg%5Cmeall.pdf>

MA SPGP

<http://www.nae.usace.army.mil/reg%5Cmapgp.pdf>

Maryland SPGP-3

<http://www.nap.usace.army.mil/cenap-op/regulatory/spgp.html#mdspgp>

Minnesota and Wisconsin (Regional General Permits)

<http://www.mvp.usace.army.mil/regulatory/default.asp?pageid=681>

NH SPGP

<http://www.nae.usace.army.mil/reg%5CNHPPGPpermit.PDF>

NJ SPGP-17 (coastal)

<http://www.nap.usace.army.mil/cenap-op/regulatory/spgp17.pdf>

NJ SPGP-19 (coastal)

<http://www.nap.usace.army.mil/cenap-op/regulatory/spgp19.pdf>

OR (previous, no longer in effect) SPGP

http://www.oregon.gov/DCBS/RSL/docs/streamlining_water/SPGP_docs/SPGP_Permit_Instru.pdf

South Carolina – RGP

<http://www.sac.usace.army.mil/?action=permits.regional>

Tennessee – RGP

<http://www.mvm.usace.army.mil/regulatory/regionalgp/gp.htm>

Texas – RGP, PGPs

<http://www.swf.usace.army.mil/pubdata/environ/regulatory/permitting/gp.asp>

VA SPGP

http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/PN/SPGP_2007/07-SPGP-01_mod_PN.pdf

Technical bulletin 2007 on VA changes to SPGP

<http://www.wegnet.com/documents/SPGPTechnicalBulletin-FINAL.pdf>

FL SPGP

http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/spgp_2007/interim_SOP_07-SPGP-01.pdf

http://www.dep.state.fl.us/water/wetlands/forms/spgp/SPGP_IV_Permit_Instrument.pdf

<http://www.dep.state.fl.us/water/wetlands/erp/spgp.htm>

Washington – RGPs

http://www.nws.usace.army.mil/PublicMenu/Menu.cfm?sitename=REG&pagename=mainpage_RGPs

For further information, see “Addressing the Gaps: A Federal, State, Local and Tribal Partnership for Wetland Regulation,” Jon Kusler, PhD, Esq., ASWM (2004)

http://aswm.org/pdf_lib/statepartnership.pdf

