



Updates on Federal Wetland Permitting in Massachusetts

The New England District of the U.S. Army Corps of Engineers (USACE) has issued draft statewide Massachusetts General Permits (GPs), for work within Waters of the U.S. The current GPs expire on April 5, 2023. Based on the draft 2023 GPs most recently issued in March, the new final GPs are anticipated to go into effect on April 7, 2023.

Note that the timelines and details described herein are based on draft GP documents and are subject to change.

What if my project is already in construction (or about to start)?

If construction will be completed by April 5, 2024, the project can continue to be covered under the terms and conditions of the current (2018) GPs. The permittee must be able to document to the Corps' satisfaction that the project was under construction or under contract to commence before April 5, 2023.

If construction will extend beyond April 5, 2024, the project will be eligible for a reverification process for coverage under the new (2023) GPs. However, expect extended timelines on reverification due to the queue.

What if I have an approval but I haven't started construction?

Projects that have not begun construction by April 5, 2023, must re-apply for coverage under the new GPs.

How VHB Can Help

VHB's team of environmental scientists has been reviewing the draft GPs to understand what will change and how we can best support our clients in navigating these regulatory changes. The draft shows that the USACE has largely rewritten the GPs rather than simply updating the prior GPs. Major changes include the following:

Removal of Self Verification (SV)—eligible provisions for Northern Long-Eared Bat (*Myotis septentrionalis*), Roseate Tern (*Sterna dougallii*), Piping Plover (*Charadrius melodus*), and red knot (*Calidris canutus*)

- Note that a project will not be eligible for coverage under these GPs if it receives a determination from the Information for Planning and Consultation (IPaC) tool of “may affect, not likely to adversely affect” for a federally listed threatened and endangered species— unless consultation addressing the effects has been previously completed.

Limits on construction mats for SV eligibility:

- In non-tidal waters: must be in place for less than six months
- In tidal waters: must total 5,000 square feet or less

Blanket time-of-year restriction from January 15 to November 15 for all work in tidal waters that is not done “in the dry”

Recommendation to submit SVs at least 60 days prior to construction start

- Note that construction cannot begin until 30 days after submission of project information to the Massachusetts Historical Commission, Tribal Historic Preservation Officer(s), and the Bureau of Underwater Archaeological Resources.

Additional guidance for compliance with Section 106 of the National Historic Preservation Act (Appendix A)

Additional guidance on avoiding, minimizing, and providing compensatory mitigation for impacts (Section V)

- The GPs now specify that compensatory mitigation is required for permanent impacts greater than 5,000 square feet. If the project requires a PCN but involves impacts under 5,000 square feet, it will be up to the reviewer to determine whether mitigation is necessary. (General Condition 7)

The ENG 4345 Form is now required for all SV and Pre-Construction Notification (PCN) applications

Detailed checklists that must be included in SV and PCN submissions

Ocean disposal of dredged material now requires an Individual Permit (GP 7)

The addition of two new GPs, for Living Shoreline Projects (GP 20) and Emergency Situations (GP 25)

The new GPs recommend that PCN application materials are submitted at least 90 days prior to construction start. However, based on VHB's experience, the USACE is experiencing extended review timelines and approval could take up to a year.

What to Expect for Specific Markets

Real Estate/Institutional Projects

Real estate and institutional projects may be covered under a variety of different GPs depending on the scope of the work. In general, however, these projects will need to plan for extended permitting timelines. As identified above, there are longer timeframes on SV submittal (60 days recommended, 30 days minimum) before construction. This does not include the MHC/Tribal 30-day review timeframe, nor the timeframe for any U.S. Fish and Wildlife Service consultation, which must be included in the SV submittal.

If the project will require a PCN, be prepared to allow up to a year to receive approval. Non-tidal projects requiring a PCN also require an Invasive Species Control Plan (this should also be approved by the local Conservation Commission), unless otherwise directed by the USACE.

Energy Projects

Utility line projects are now under GP 6. The new GP now allows for some work in tidal waters to be SV-eligible, as long as they are not located in saltmarsh or tidal vegetated shallows. This GP also now explicitly includes coverage for temporary matting (as before, matting impacts do not count toward SV/PCN thresholds).

In addition, there are two new PCN triggers for:

- unconfined work/silt-producing activities in streams with diadromous fish
- submarine cables/conduits/pipelines under navigable waters

Survey activities such as **soil borings** are now under GP 15. Previously, impacts for an SV were limited to 1,000 square feet of permanent and 5,000 square feet of temporary impacts in non-tidal waters; and only temporary structures in tidal waters provided no impacts occurred. The SV-eligible limits in the new GP are:

Non-tidal: up to 5,000 square feet of combined permanent and temporary impacts

Tidal: up to 5,000 square feet of combined permanent and temporary impacts, except:

- work in saltmarsh or tidal vegetated shallows require a PCN
- work in mudflats/natural rocky habitat are allowed up to 1,000 square feet of combined impacts

Renewable energy generation facilities are now under GP 16. The thresholds and requirements for this work are the same as before; however, there is a new provision for pilot projects (defined as “an experimental project where the renewable energy generation units will be monitored to collect information on their performance and environmental effects at the project site”). Upon completion of these pilot projects, the generation units, transmission lines, and other structures or fills must be removed to the maximum extent practicable.

Culvert replacements are now covered under GP 23. The new GP explicitly mentions that compliance with the Massachusetts Stream Crossing Standards is required when practicable for SV-eligible projects (previously this was only in the General Conditions). There is also an additional statement that, for tidal crossings, modeling is “encouraged” to demonstrate the crossing is not undersized and will be resilience to sea level rise.

Temporary construction, access, and dewatering is now under GP 24. This GP would cover temporary structures and discharges such as cofferdams for culvert replacements; temporary impacts associated with utility line work are generally covered under GP 6. There are no major changes to this GP. The new language explicitly calls out any work (besides matting) in saltmarsh as requiring PCN (previously the language referred to Special Aquatic Sites, which do include salt marshes but would have required referencing the definition in the glossary).

There is a new GP for **emergencies** (GP 25). For Severe Weather Emergency Declarations issued by MassDEP, work can be conducted under an SV provided that:

- The work involves only minor deviations in the structure or fill area; **and**
- It does not otherwise require a PCN (such as for adverse impacts to cultural resources, culvert replacements that do not meet Stream Crossing Standards, or activities that may affect federally listed species or habitat).

Note that a FEMA-declared disaster requires a PCN.

Transportation Projects

Transportation projects will likely require authorization under GP 8 (U.S. Coast Guard Approved Bridges), GP 9 (Bank and Shoreline Stabilization), and GP 23 (Linear Transportation Projects and Wetland/Stream Crossings).

GP 8 for **U.S. Coast Guard Approved Bridges** now has limits for discharges into navigable waters of the U.S. that are incidental to the construction of bridges. Projects that are SV-eligible must meet the following:

- Permanent impacts from discharges that are $\leq 5,000$ square feet.
- Combined permanent and temporary impacts that are $\leq 1,000$ square feet in mudflats and natural rocky habitat.
- Not located in saltmarsh and tidal vegetated shallows.

Under GP 9 for **Bank and Shoreline Stabilization**, the threshold for SV eligibility has increased to 400 total linear feet when necessary to protect transportation infrastructure. However, if this work is located in non-tidal wetlands, saltmarsh, or vegetated shallows, it will require a PCN. The PCN thresholds have also been increased to 1,000 total linear feet when necessary to protect transportation infrastructure.

As mentioned above for GP 23 (**Linear Transportation Projects and Wetland/Stream Crossings**), the new GP explicitly mentions that compliance with the Massachusetts Stream Crossing Standards is required when practicable for SV-eligible projects, and there is an additional statement that, for tidal crossings, modeling is “encouraged” to demonstrate the crossing is not undersized and will be resilience to sea level rise.

Note that as before, in accordance with 33 CFR 323.4(a)(2), certain maintenance activities, including emergency in-kind repairs of currently serviceable structures, are not subject to regulation under Section 404 of the Clean Water Act.

Federal Projects

Projects within Federal Lands, such as National Parks and Wildlife Refuges, are still not eligible for SV and must file a PCN.

A new requirement relative to Federal Projects that was not included in the prior GP is that, rather than the Regulatory Division assisting the proponent to coordinate with the appropriate USACE District, applicants are required to check this database to determine proximity to USACE Civil Works Projects.

For work occurring on or potentially affecting USACE properties or USACE-controlled easements, applicants must now contact the USACE Real Estate Division at (978) 318-8585 to initiate reviews and determine what real estate instruments are necessary. Work may not commence on USACE properties and/or USACE-controlled easements until they have received any required USACE real estate documents evidencing site-specific permission to work.

Projects that may obstruct or impair the usefulness of any Federal project in any manner must receive prior approval by the USACE pursuant to 33 USC Section 408. The USACE written verification for the PCN will not be issued until after the USACE issuance of the decision on the Section 408 permission request.

VHB’s environmental scientists are highly experienced in regulatory assessments and permitting across all of our market sectors. For specific questions and information regarding how the new GPs may apply to your project, connect with our Massachusetts market permitting specialists.

Energy



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