



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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MAY 29 2009

Colonel Edward J. Kertis  
District Engineer  
Attn: Ms. Megan Singleton  
U.S. Army Corps of Engineers  
P.O. Box 889  
Savannah, Georgia 31402-0889

Subject: Regional General Permits for Publically Funded Projects - 200900170

Dear Colonel Kertis:

This is in response to your request for comments on the above referenced joint public notice (JPN). Your office proposes to issue four new Regional General Permits (RGPs) for publically funded projects with impact limits of 5 acres/1,000 lf or 10 acres/2,000 lf (for projects with multiple crossings) as follows:

- RGP 105 - Widening or improvement of existing transportation projects
- RGP 106 - Bridge replacement projects
- RGP 107 - Construction of institutional facilities such as governmental offices, schools, libraries and museums
- RGP 108 - Construction of infrastructure projects such as water treatment facilities and storm water management facilities

The Environmental Protection Agency (EPA) has reviewed the JPN and attached information. Based on the JPN it appears that these RGPs are intended to be used to expedite projects under the American Recovery and Reinvestment Act (ARRA). EPA clearly understands the need to expeditiously address ARRA projects and supports the Administration's efforts. Although the RGPs are one way to approach that, EPA also believes that the existing permit structure can be used to authorize ARRA projects.

EPA also has concerns that based on our review, the proposed issuance of the RGPs does not comply with the Clean Water Act (CWA) Section 404(e), the Section 404(b)(1) Guidelines or 33 CFR 322.2(f). It also constitutes a significant federal action under the National Environmental Policy Act (NEPA) with potentially significant direct, indirect and cumulative impacts on aquatic resources, including possibly aquatic resources of national importance (ARNI). For the reasons outlined below we recommend the RGPs, as currently proposed, not be issued.

### Specific Comments/Concerns

Section 404(e) allows the Secretary of the Army, acting through the Chief of Engineers to issue general permits, such as the proposed RGPs. Under 404(e)(1)(A) all general permits must

comply with the Section 404(b)(1) Guidelines. Under Section 404(e)(2) there is a provision for a public hearing on any proposed general permit and this is also noted in the JPN. We find the proposed RGPs of such significance that we recommend your office hold a public hearing.

Under 33 CFR 332.2(f)(1) general permits must be for “those activities (that) are substantially similar in nature and cause only minimal individual and cumulative environmental impacts.” Under 322.2 (f)(2) the general permit may be issued only if “the general permit would result in avoiding unnecessary duplication of the regulatory control exercised by another Federal, state, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal.”

As written, the proposed RGPs could authorize a suite of activities that are not similar in nature and have the only connection being some undefined level of public funding. The projects individually and cumulatively have the potential for more than minimal direct, indirect and cumulative impacts. The RGPs duplicate many of the activities subject to the current set of nationwide permits (NWP) and appear to simply raise the impact threshold for certain NWPs. Thus we find that the RGPs are duplicative of the NWPs, but exceed their impacts.

The preamble to the current NWPs issued March 12, 2007, states “The acreage limits for the NWPs are established so that they authorize most activities that result in minimal adverse effects on the aquatic environment.” The current NWPs are the result of a progression of reductions in the extent of impacts and now, as the statement above indicates, represent what is considered to be a “minimal” level of impacts. The proposed RGPs increase these limits ten fold (or more) in many cases.

Many of the proposed RGP activities (with smaller impacts) could be authorized under NWPs such as NWP 14 (linear transportation projects), NWP 23 (approved categorical exclusions), NWP 39 (commercial and institutional developments), NWP 42 (recreational facilities) and NWP 43 (stormwater management facilities) to cite some examples. Thus the RGPs are in many ways duplicative of existing NWPs. Projects with larger impacts could be processed under letters of permission or individual permits (IPs).

As noted above, the JPN cites the need to expedite projects under the American Recovery and Reinvestment Act (ARRA). However, the RGPs do not include a requirement that ARRA funding be involved in any project authorized by one of the RGPs. Instead the RGPs apply to all publically funded projects. Thus, the ARRA does not appear to have a role in the RGPs. What the RGPs appear to do is reduce the level of environmental review for public works projects and, as noted above, raise the impact thresholds for certain of the current NWPs.

It is also unclear as to why wetland and stream impacts from public works projects differ from those of all other projects. Under the proposed RGPs the same level of impacts for a public works project would be deemed “minimal” while for a privately funded project they would not be minimal and would require an individual permit.

The RGPs also use many terms that are not defined. For example, “public works project,” “transportation project,” and “tidal waters” should be defined clearly. Other terms are used in ways that are unclear and should be defined. For example, the term “impacts that are minor in nature” should have a clear meaning.

EPA is also trying to understand the distinctions among the RGPs and the scope of others. For example, why would a bridge replacement project (RGP 106) not qualify as an improvement of an existing transportation project (RGP 105)? RGPs 107 and 108 use the term “such as” which implies that potentially a multitude of activities could be included under these RGPs. RGPs 107 and 108 propose to authorize activities that are not similar in nature and thus clearly do not comply with 33 CFR §332.2(f). It should be noted that it would take a number of NWP and IP to cover the activities under RGPs 107 and 108, which further indicates how dissimilar the activities may be.

EPA is also concerned that there is only a limited justification provided for the impact limits for the RGPs. In some cases these impacts are at least 10 times the current limits for most activities in the NWPs. We believe these limits may have much more than minimal direct, indirect and cumulative impacts. Linear projects can have considerable impacts due to their extent, often crossing multiple watersheds and fragmenting habitat. Some assessment was made of past projects that could have qualified for the proposed RGPs. However, it appears one motivation for the issuance of the RGPs is an expected increase in the number of publically funded projects. Thus, we question whether the past permit activity is an accurate guide to the number and types of future activities. It should be noted that under the current permitting process many applicants avoid and minimize their impacts so that their projects could be authorized under the NWPs. This incentive would be lost under the much higher impact thresholds of the RGPs.

EPA also looked at the application requirements for authorizations under the proposed RGPs and found they were not clearly spelled out. Many of the requirements call for “discussions” of alternative measures to avoid or minimize impacts without clearly identifying what form or structure the discussions would take. We are also unclear as to what would constitute a public meeting that is acceptable under the RGPs. Public meetings are not a requirement for individual permits.

EPA would also like to understand how the RGPs will be implemented. The current RGPs and NWPs do not always have a full review under the section 404(b)(1) guidelines. There have been concerns with how projects fit under a particular NWP and the location of mitigation. With a potentially increased workload, as the RGP proposal implies, it will be difficult to conduct all the proper reviews required by the CWA and NEPA.

We also have concerns with the potential for “stacking” of RGPs and combinations with NWPs and IPs. While condition 25 appears to address this issue, there has been historically considerable debate about what constitutes a “single and complete project.” For example, we have reviewed projects that allow initial site work under NWPs for the installation of entrance roads and utilities on a project site and then allow application for an IP for other site impacts. We have commented that these initial site activities do not have independent utility from the larger project and do not constitute a single and complete project. They act to limit the alternatives in the IP review process. We envision considerably more debate about what constitutes a single and complete project under these proposed RGPs, particularly since the activities are not well defined. We remain concerned that the RGPs could be used as a “foot in the door” authorization for a much larger project (or phased project) as is currently being done with the NWPs. These combinations of RGPs, NWPs and IPs have the potential for major overall impacts.

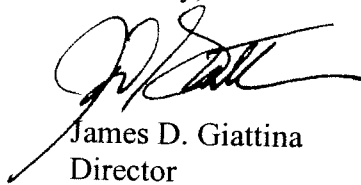
Finally, we find that the proposed issuance of the RGPs may constitute a significant federal action under NEPA with significant direct, indirect and cumulative impacts on aquatic resources, including possibly ARNI. Thus, prior to issuance of any RGPs with this level of proposed impact, we recommend that your office prepare a full environmental assessment (EA). This EA should be completed and made available to the public concurrent with a revised public notice for the RPs. The EA should address:

- a. The purpose and need of each RGP;
- b. All regulatory alternatives to the issuance of new RGPs, including the no action alternative;
- c. Alternative activities covered/excluded under the RGPs;
- d. Alternative parties to conduct activities under the RGPs;
- e. Justification for the designation of the 4 RGPs and the activities they cover;
- f. Alternative thresholds for the wetland/stream impacts under the RGPs;
- g. The rationale for selecting the proposed impact thresholds; and
- h. An assessment of the potential direct, indirect and cumulative impacts of the RGPs.

In summary, we find that the proposed RGPs 105, 106, 107 and 108 do not comply with CWA Section 404(e), the Section 404(b)(1) Guidelines, and 40 CFR 332.2(f). They do not cover activities that are similar in nature and the activities are likely to have more than minimal impacts. They duplicate the permitting processes under the NWP and IP and essentially modify the NWP by raising the impact levels. There is no binding provision that applicants select the least environmentally damaging practicable alternative (LEDPA) or avoid and minimize impacts to the maximum extent practicable. Mitigation requirements may be similar for those of the NWP which are not subject to a rigorous evaluation of the mitigation proposal. We believe there is a need under NEPA for a full assessment of the purpose and need for the RGP alternatives that may meet the purpose, selection of an alternative or alternatives that are the LEDPA and a full assessment of the impacts of the preferred alternatives. Therefore, we recommend the RGPs not be issued as proposed.

Thank you for the opportunity to review this JPN. We look forward to working with your office to resolve our concerns with these RGPs and the permitting of publically funded projects. Should you have any questions regarding our comments, please contact me at 404-562-9470 or have your staff contact Robert Lord of the Wetlands Marine and Regulatory Section at 404-562-9408.

Sincerely,



James D. Giattina  
Director  
Water Protection Division

cc: See Enclosed List

**CC List: Regional General Permits for Publically Funded Projects - 200900170**

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