



United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, D.C. 20240

APR - 1 1996

Honorable H. Martin Lancaster
Assistant Secretary of the Army (Civil Works)
Department of the Army
Washington, D.C. 20310

Dear Mr. Lancaster:

In accordance with provisions of the December 21, 1992, section 404(q) Memorandum of Agreement between our agencies, the Department of the Interior is requesting your review of the Baltimore District Engineer's decision to authorize the Maryland State Programmatic General Permit. The MDSPGP would authorize discharges of dredged or fill material in up to 5 acres of all waters of the United States within Maryland for a wide range of dissimilar activities. The MDSPGP would supercede and broaden the reach of the Maryland General Permit for Non-Tidal Wetlands. The Department has determined that this case warrants elevation in accordance with criteria found in Part IV of the Memorandum of Agreement (Elevation of Individual Permit Decisions). Issuance of the MDSPGP, as currently written, will have substantial and unacceptable adverse effects on aquatic resources of national importance for reasons detailed below.

One element of the Administration's comprehensive package of improvements to the Federal wetlands program (Protecting America's Wetlands: A Fair, Flexible, and Effective Approach; August 24, 1993) is a commitment to assist State governments with existing regulatory programs in assuming a more active role in wetlands protection. The State Program General Permit is identified as a tool available to accomplish this goal. As such, we support this concept, which should reduce State and Federal wetlands regulatory program overlap, provide the public with more predictable reviews of projects having minimal impacts, provide increased efficiency for project reviews, enhance wetland conservation, and ensure better compliance with the Clean Water Act.

However, the Department believes that, as written, the MDSPGP does not meet the Administration's objectives. Moreover, the District Engineer has decided to issue this permit before all resource concerns and procedural inconsistencies have been resolved, and before concurrence on Standard Operating Procedures has been achieved. We are concerned that the permit, as proposed, is inconsistent with the purpose and intent of general permits, as defined by section 404(e)(1) of the Clean Water Act (33 U.S.C. 1344) and the Environmental Protection Agency section 404(b)(1) guidelines (40 CFR 230.7). It is our opinion that the proposed MDSPGP will result in more than minimal individual and cumulative environmental impacts to Federal trust fish and wildlife resources. The

Department, acting through the Fish and Wildlife Service, is vested with the authority to protect, conserve, restore and enhance the Nation's fish, wildlife, and habitats. These matters fall within our jurisdiction under the Fish and Wildlife Coordination Act; the Fish and Wildlife Act of 1956; the Endangered Species Act of 1973, as amended; the Migratory Bird Treaty Act; the Emergency Wetlands Resources Act; and section 404(m) of the Clean Water Act.

Issuance of the MDSPGP will weaken Federal, and ultimately State, regulatory protection for estuarine and palustrine forested and scrub-shrub wetlands surrounding Maryland's Chesapeake Bay, which the Department has determined constitute aquatic resources of national importance. This reduction in wetland protection will result from institution of a permit authorization process applicable to all waters of the United States in Maryland, and an accelerated project review process that would make wetlands permits easier to obtain with fewer safeguards than are available under the current State/Federal regulatory framework.

Maryland contains approximately 600,000 acres of wetlands, 90 percent (roughly 540,000 acres) of which lie within the Chesapeake Bay watershed. The Chesapeake Bay is the Nation's largest estuary, and the second largest estuary in the world, with a surface area of 4,400 square miles and a watershed encompassing 64,160 square miles. The Bay is a highly productive coastal estuary providing spawning and nursery habitat for 265 species of fish, including over two dozen interjurisdictional species such as American eel, river herring, American shad, and striped bass. The Bay also provides habitat to over 2,700 migratory and resident wildlife species, including wintering habitat for 28 species of waterfowl, and is noted for its productive shellfisheries, particularly blue crabs, soft-shelled clams, and oysters. Records from 1986 indicate that 20 percent of the oysters and over 50 percent of the blue crabs and soft-shelled clams caught in the United States were harvested from the Bay. The Chesapeake Bay was also designated as a Wetland of International Importance under the Ramsar Convention.

Maryland's estuarine and palustrine wetlands are of national importance in providing critical habitat and maintaining the productivity of the Bay. Palustrine forested and scrub-shrub wetlands, which are likely to suffer the greatest impacts under the proposed permit, are essential to maintenance and eventual restoration of water quality and habitat diversity of the Bay ecosystem. Of the more than 342,000 acres of palustrine wetlands in Maryland, nearly 298,000 acres are palustrine forested and nearly 15,000 acres are palustrine scrub-shrub wetlands. Adjacent to the Bay itself are nearly 2,500 acres of estuarine scrub-shrub wetlands. The wetlands bordering the Bay provide important water quality enhancement functions by acting as sediment and nutrient traps, preventing this material from entering the Bay and degrading water quality. In addition, these forested and scrub-shrub wetlands are vital to the long-term stability of neotropical migratory bird populations, and forested wetlands within 0.9 miles of the Bay coastline are of particular importance as stopover habitat. Within the northeast region of the United States, the majority of neotropical

migrants exhibiting population declines are those associated with successional (scrub-shrub) habitats such as those found adjacent to the Bay.

Adverse impacts to the palustrine, riverine, and estuarine wetlands of the Chesapeake Bay watershed resulting from reduced regulatory protection will lead to direct and indirect adverse impacts to the fish and wildlife resources which they support. Over the 5 years the proposed permit will be in effect, relaxed Federal permit standards are likely to accelerate direct loss of wildlife habitat, lead to forest fragmentation, and exacerbate water quality problems in the Bay. These impacts will in turn lead to declines in populations of migratory and resident birds, fish, shellfish and submerged aquatic vegetation.

The Department is concerned that implementation of the MDSPGP will not provide equivalent protection for aquatic resources, nor will it reduce unnecessary duplication of State and Federal wetlands regulatory programs or simplify the authorization process for regulatory agencies and the public. The proposed permit is intended to apply to projects affecting up to 5 acres, and thus may authorize projects having more than minimal effects. The MDSPGP would expand the use of less stringent general permit procedures into waters not covered by MDGP-1 (such as tidal wetlands), which heretofore required completion of a full individual permit review process for most projects. In addition, our reading of the permit and Standard Operating Procedures suggests that the Corps may not intend to provide adequate notice and comment on significant future changes to the State program, including program delegation to counties or new State general permits. Above all, the MDSPGP is rife with internal inconsistencies, and will be very difficult for the public and agencies to understand and use.

Finally, we have seen no evidence that the District has evaluated the potential impacts of this permit as is required by the section 404(b)(1) guidelines. Therefore, we do not share the District's apparent confidence that the total cumulative adverse impacts resulting from use of this permit will be minimal. As written, the permit sends the wrong message to the public by suggesting that up to 5 acres of fill is a minimal amount of wetland disturbance, thereby losing the opportunity to encourage permit applicants to downsize projects to obtain the benefits of expedited permit review. Furthermore, we believe the 5-acre upper threshold would, over time, encourage authorization of larger projects. A threshold this high will require much greater reliance on Corps' assertion of its discretionary authority and, therefore, on commenting agency recommendations, as a means to ensure that wetland impacts are minimal. Such a process is likely to create unnecessary conflict and misunderstanding. A far more reasonable approach would be to set thresholds for permit use at levels which truly provide the public with certainty over the degree of scrutiny that the Federal Government will use in permit evaluation.

The Department and the Fish and Wildlife Service have worked successfully with several States to develop effective SPGP's, and we fully support development of such a permit in Maryland. Accordingly, the Department will support issuance of the MDSPGP provided

that the District is directed to modify the proposed permit and its implementing procedures to address our concerns:

1. Complete and publish a thorough assessment of the potential individual and cumulative impacts of the categories of activities to be regulated under the proposed permit before its authorization. The section 404(b)(1) guidelines provide that, "[T]he evaluation must be completed before any general permit is issued, and the results must be published with the general permit....The evaluation shall include a precise description of the activities to be permitted under the general permit, explaining why they are sufficiently similar in nature and in environmental impact to warrant regulation under a single general permit, based on Subparts C through F..." (40 CFR 230.7(b)(1)-(3)).
2. Establish an upper threshold for wetland impacts of less than one acre to limit authorizations to projects with minimal individual and cumulative adverse effects.
3. Develop a revised and simplified table of categories of activities based on across-the-board Federal standards, as in the State Program General Permits of New Hampshire, Maine, and Massachusetts. We recommend a single lower threshold of 5,000 square feet exclusive of salt marshes and other sensitive areas (such as vernal ponds), and recommend that all permanent fill in salt marsh require an individual permit.
4. Establish a quick and automatic resource agency kick-out to ensure that projects with the potential to adversely affect resources of Federal interest are scrutinized, and that permit applicants will be notified as soon as possible whether there will be additional requirements for authorization.
5. Establish stronger permit conditions to ensure that a comprehensive range of alternatives is examined prior to authorization of wetland fills, and with a requirement that replacement of values and functions are provided for through compensatory mitigation.
6. Institute a trial period for use of the permit to allow State and Federal agencies to monitor its effectiveness, and make adjustments as necessary.
7. State clearly that no project may receive authorization under this general permit which does not, at a minimum, receive State review and authorization.
8. Include a commitment to revoke nationwide or other general permits in the State that involve discharges of dredged or fill material.

9. Clarify that this permit does not apply to any part of the State program delegated to a county, unless such programs are subject to full Federal agency and public review, and are determined to comply with Federal requirements.
10. Modify Attachment 12 to include Federal interagency review and notice of any new State general permits.

We appreciate the opportunity to meet with you on this issue on March 22, 1996, and for the meeting between Mr. Michael Davis and Fish and Wildlife Service and National Marine Fisheries Service staff on March 28, 1996. At the latter meeting, we were assured that nationwide permits would be revoked in Maryland, and that permit's Standard Operating Procedures would be clarified and simplified. Despite these positive steps, our fundamental concerns with the MDSPGP remain.

Additional documentation substantiating the above concerns and recommendations as they relate to proposed issuance of the MDSPGP is enclosed. The Department of the Interior requests your review of the District Engineer's decision to issue the MDSPGP based on the information used and procedures followed by the Baltimore District in reaching that decision.

Sincerely,

/s/ George T. Frampton Jr.

George T. Frampton, Jr.
Assistant Secretary for Fish
and Wildlife and Parks

Enclosure

**ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS
EVALUATION AND REQUEST FOR REVIEW**

MARYLAND STATE PROGRAMMATIC GENERAL PERMIT

AQUATIC RESOURCES OF NATIONAL IMPORTANCE

Located largely within the State of Maryland, the Chesapeake Bay is the Nation's largest estuary, and the second largest estuary in the world. The Bay has a surface area of 4,400 square miles and a watershed encompassing 64,160 square miles. Maryland contains approximately 600,000 acres of wetlands, 90 percent of which (roughly 540,000 acres) lie within the Chesapeake Bay watershed. This represents 55 percent of the original wetland acreage found in Maryland (Tiner and Burke, 1995). In addition, the Maryland portion of the Chesapeake Bay possesses roughly 1.6 million acres of deepwater habitats. The Bay is a highly productive coastal estuary providing spawning and nursery habitat for 265 species of fish including over two dozen interjurisdictional species such as American eel, river herring, American shad, and striped bass. A significant effort is underway to restore the Bay's stocks of interjurisdictional fishes. However, these initiatives will be ineffective if there is continued degradation of the spawning and nursery zones resulting from the loss of critical aquatic, wetland and riparian habitats. Fish spawned within the Maryland portion of the Bay's drainage contribute to the vast coastal stocks that migrate between Nova Scotia and Florida, sustaining commercial and recreational fisheries. The largest and best known of these fish species to utilize Chesapeake Bay is the striped bass (*Morone saxatilis*). The Chesapeake Bay is the largest striped bass spawning ground on the East coast. Maryland contains a number of key spawning rivers including the Chester, Choptank, Patuxent, Potomac, and Nanticoke, as well as an upper Bay population. Striped bass produced within the Chesapeake Bay make up the bulk of the coastal migratory stock. All of these sought-after species of fish are wetland dependent, utilizing the wetlands directly as nursery habitat or benefitting from the vast planktonic populations supported by wetland exports of detrital material and nutrients to feed their larval and juvenile populations. The riverine systems associated with forested wetlands support resident populations that rely on the water quality functions performed by these wetlands. During periods of flooding, some species will forage throughout forested wetlands.

The Bay is also noted for its productive shellfisheries, most notably blue crabs, soft-shelled clams and oysters. Records from 1986 indicate that 20 percent of the oysters and over 50 percent of the blue crabs and soft-shelled clams caught in the United States were harvested from the Chesapeake Bay. The nearly 252,000 acres of estuarine wetlands and more than 342,000 acres of palustrine wetlands in Maryland are of national importance in providing critical habitat and maintaining the productivity of the Chesapeake Bay. Harvest of virtually all important commercial species are at all time historic lows. Oyster populations are estimated to be at 1 percent of their population levels at the beginning of this century. In addition to overfishing, habitat loss and/or destruction is one of the principal causes of these declines.

The Chesapeake Bay provides habitat to over 2,700 migratory and resident wildlife species, including wintering habitat for 28 species of waterfowl. Currently, about one million waterfowl winter on the Bay each year between October and April. These birds make up more than one-third of all waterfowl wintering along the Atlantic Coast. For some species, the Bay is the most important wintering area in the United States. Bay waterfowl depend on ice-free wetlands and good water quality, and the need for a reliable winter food source makes habitat preservation and enhancement a crucial part of waterfowl conservation.

Colonial waterbirds are another prominent and ecologically important component of the Chesapeake Bay ecosystem in Maryland. They include 19 species with 231 breeding colonies comprised of an estimated 20,112 breeding pairs. Of these species, the colonial wading birds (herons and egrets) are perhaps most directly tied to wetlands. They represent 8 species with 123 breeding colonies and an estimated 11,714 breeding pairs (Brinker, et al., 1994). Critical factors in maintaining these populations are 1) isolated forested islands or extensive bottomland (riparian forests with limited human access and disturbance), and 2) extensive wetlands for feeding, with good interspersions of low and high marsh pools and tidal tributaries.

There are also 31 federally listed endangered or threatened species in Maryland, one candidate, and 62 Federal species of concern. The majority of federally listed and candidate species are dependent on wetland or shallow water habitats during all or part of their life cycle, utilizing non-tidal freshwater wetlands, wet meadows, freshwater emergent wetlands, non-tidal palustrine forested wetlands, wet depressions, vernal pools, small isolated freshwater ponds, springs, small streams, rivers, tidal freshwater emergent marshes, salt marshes, tidal mudflats, intertidal sand substrates, and beds of submerged aquatic vegetation.

In addition to contributing directly to the biological productivity of the Chesapeake Bay by providing habitat, the wetlands of Maryland are extremely important to improving and maintaining the water quality of the Chesapeake Bay. Forested wetlands make up a significant acreage, consisting of 290,000 acres (50 percent) of all wetlands in Maryland (Tiner and Burke, 1995). Forested wetlands are subject to periodic flooding, a hydrologic regime that not only supports the wetland forest, but also defines the wetland functions recognized in wetland regulations. Because of their location and vegetation, forested wetlands intercept and store rainfall, runoff, and snowmelt, releasing it slowly and lowering peak flows downstream. The physical structure of the vegetation itself can impede the flow of flood waters, thereby reducing erosion, removing sediment, and preventing downstream damage. They also capture and control harmful pollutants such as phosphorous and nitrogen before they can reach the Chesapeake Bay.

Forested and scrub-shrub wetlands are also vital to the long-term stability of populations of many neotropical migratory bird species. Neotropical migrant songbirds occupy vegetation types of all age classes. Most neotropical migrants use forested wetlands, and several of these prefer or depend on the forest interior. In addition, forested wetlands may prove to

be more critical than other forested upland habitats by supporting higher bird densities and diversities (Smith, 1977; Swift et al., 1984; Petit et al., 1985). The reasons appear to be related to the availability of water, leading to more abundant and diverse foliage for nesting and cover from predators, and to increased food supplies in the form of high invertebrate populations. For example, a study of forest birds on a gradient of moist to dry forest in Arkansas concluded that no avian species preferred dry forest (Smith, 1977). In a study of bird communities in forested wetlands in Massachusetts, breeding bird communities in forested wetlands were significantly related to vegetation structure and hydrology. The wettest sites appeared to have the most abundant and diverse breeding populations (Swift et al., 1984). In Maryland, forested areas within 0.9 miles of the coastline are of critical importance as stopover habitat for neotropical migrants (Mabey et al., 1993). Within the northeast region of the United States, the majority of neotropical migrant birds exhibiting population declines are those associated with successional (scrub-shrub) habitats (Smith et al., 1993). The maintenance of forested and scrub-shrub wetland habitats, particularly large tracts, and the maintenance of natural scrub-shrub habitats such as those occurring along shorelines and dominated by bayberry and high-tide bush are recommended for the protection of neotropical migrants (Mabey et al., 1993).

Vernal ponds found within forested wetlands are critical to the reproduction of many of the amphibians found in Maryland. A rich food supply of microscopic algae and tiny invertebrates, plus a lack of predators contribute significantly to survival of the egg and tadpole stages of their life cycle. Many mammals also utilize forested wetlands for many of the reasons noted above. Beaver, in particular, are re-invading forested wetlands from which they were extirpated centuries ago.

The national importance of the Chesapeake Bay and its associated wetlands was fully recognized in 1987 when the comprehensive Chesapeake Bay Interagency Federal Agreement was signed. The principal goal of this initiative is the restoration of the Bay's living resources. The Agreement recognizes that the entire natural ecosystem must be healthy and productive. In addition, the Agreement notes that the importance of the Bay's resources transcends regional boundaries and must be managed as an integrated ecosystem. This Agreement also contains a commitment to "develop and begin to implement a Bay-wide policy for the protection of tidal and nontidal wetlands." On January 5, 1989, the Agreement signatories adopted a detailed Chesapeake Bay Wetlands Policy which establishes an immediate goal of no net loss with a long-term goal of a "net resource gain". The Chesapeake Bay Wetlands Policy seeks to achieve a net resource gain in wetlands acreage and function by, among other things, protecting existing wetlands. The Service, the Corps of Engineers, and the State of Maryland, among others, are represented as signatories to the Chesapeake Bay Agreement and the Wetlands Policy.

In addition to its national importance, the international importance of the Chesapeake Bay (and Maryland's) wetlands was recognized when the Bay was designated as a Wetland of International Importance under the Ramsar Convention.

Historical Wetland Losses

Historically, Maryland has lost 45 percent of its wetlands. From 1982 to 1989, Maryland experienced a net loss of 4,324 acres of palustrine vegetated wetlands and 562 acres of estuarine vegetated wetlands. In addition, a net total of 2,062 acres of farmed wetlands were effectively drained and converted to upland agriculture. More acres of palustrine forested wetlands were destroyed than any other wetlands type, with an estimated 2,534 acres converted to uplands or waterbodies between 1982 and 1989. The main causes for palustrine forested wetland destruction were agriculture (31 percent), pond construction (28 percent), and urban/rural development (22 percent). An estimated 2,370 acres of palustrine emergent wetlands were converted to uplands or waterbodies between 1982 and 1989. Despite a net gain overall, within the same time period an estimated 454 acres of palustrine scrub-shrub wetlands were filled or permanently flooded; an estimated 671 acres of estuarine emergent wetlands were also destroyed (Tiner and Burke, 1995).

SUBSTANTIAL AND UNACCEPTABLE ADVERSE IMPACTS

It is the Department's position that authorization of the proposed Maryland State Programmatic General Permit will lead to expedited permitting with fewer environmental safeguards than currently exist under the Federal regulatory program. We believe further that this may ultimately serve to weaken the State's wetlands regulatory program. The imposition of lower Federal standards, together with the permit's procedural shortcomings, will lead to substantial and unacceptable impacts to aquatic resources of National importance.

Specifically, the MDSPGP would result in a less effective Federal/State regulatory program in Maryland, and around the Chesapeake Bay in particular, for the following reasons:

Activities up to 5 acres could be authorized by the general permit procedures, a threshold that appears to exceed the minimal effects criteria of section 404(e) and the section 404(b)(1) guidelines.

A high impact threshold sends a message to the public that the Federal government believes that as much as 5 acres of fill qualifies as a minimal impact. It is not clear how the District can support their assertion that this action will cause no more than minimal impacts, either individually or cumulatively. In our view, a project with less than 5,000 square feet (about 0.1 acre) of wetlands impacts typically has "minimal" individual impacts. A project that affects over 1 acre of aquatic habitat or wetlands almost certainly has more than "minimal" impacts, and should only be authorized through an individual permit.

The District estimates that 99.98 percent of their current regulatory program workload could be authorized by use of this general permit. Clearly, workload cannot justify choosing a 5-acre threshold over a 1-acre threshold.

Properly set thresholds serve several purposes. Appropriately low upper and lower thresholds insure that projects having only minimal effects, even with screening, are authorized. A clearly defined minimal effect threshold encourages the public to scale projects down to either avoid Federal review altogether or revert to screening in the hope of avoiding full Federal review.

The MDSPGP expands the use of general permit procedures to all waters of the U.S., including those where individual permit requirements currently apply, without adequate safeguards.

This permit expands general permit applicability to tidal and adjacent waters as well as to some non-tidal wetlands and waters not currently regulated by the State. Currently, for example, activities authorized under nationwide permit 26 are limited to those in waters and wetlands above headwaters and isolated wetlands. The MDSPGP, however, applies to all waters of the U.S. in Maryland, including headwaters, isolated wetlands, riparian wetlands, high marsh, riverine, and estuarine systems. It would, in effect, apply a NWP 26-style permit where individual permit review is currently required for almost any aquatic or wetland fill. Up to 5 acres of any aquatic or wetland habitat could be filled without full application of the 404(b)(1) guidelines. Lower, uniform thresholds for particularly sensitive areas such as vernal ponds or tidal marshes should have been provided to ensure protection under the MDSPGP that is at least equivalent to that available under current procedures.

The permit includes an overly burdensome resource agency "kick-out" process.

A "kick-out", or screening, category should be reserved for a small percentage of projects for which interagency screening is appropriate to ensure effects are minimal. The majority of minimal effects projects should fall below the suggested lower threshold of 5,000 square feet. Resource agencies should also have an automatic kick-out provision. One important advantage of the SPGPs in Massachusetts, New Hampshire and Maine is a reduction in Corps processing time (average of 12-14 days). Part of this reduction is due to the automatic kick-out authority afforded resource agencies, without reliance on lengthy elevation procedures.

There are inconsistencies between the kick-out procedures described in the permit and the "elevation" process described in the draft standard operating procedures. If an agency objects to a project under the MDSPGP, an elevation process is started that may last up to 45 days and involve agency regional offices, after which time an individual permit will be required. Lack of an automatic kickout could cause applicants to endure 45 days of uncertainty. If, on the other hand, a dispute arises over **inclusion of conditions** (as opposed to an objection to authorization, which would invoke the aforementioned 45-day proceedings) for a Tier II or III projects, agencies must invoke the 404(q) elevation process and involve either the Regional Director or Administrator. By not giving the agencies an automatic kickout in the MDSPGP, and instead adding an "elevation process", the Corps has unnecessarily lengthened and complicated its processing time.

The Corps' use of discretionary authority is supposed to be the exception rather than the rule. A project designed for authorization under a general permit is presumed to meet conditions of the general permit unless someone such as the Fish and Wildlife Service identifies why this is not the case. Setting the upper threshold at 5 acres creates false expectations on the part of the public. A permit applicant such as a builder will design a project to fit requirements of the MDSPGP, in order to avoid having to apply and receive separate State and Federal authorizations and, in particular, to avoid the Corps individual permit process. However, the District has assured the Service that any permit with more than minimal individual and cumulative impacts will be kicked out into the individual permit process. Institution of a reduced upper threshold for permit use, set at a level which all could agree would most likely never require a kick-out would seem to be a better model. Furthermore, the District's use of discretionary authority on a case-by-case basis is likely to occur late in the process when permit applicants may assume they are near completion of review.

We are concerned that, without clear and reasonable kick-out and screening thresholds, the Corps will be compelled to exercise its discretionary authority more frequently, either on its own or in response to resource agency recommendations. If the Corps, by issuing this permit, implies that up to 5 acres is a minimal effect and, if the Corps intends to be responsive to resource agency requests, then the burden of identifying those projects with more than minimal effects would fall on the resource agencies.

The permit contains inadequate conditions to assure full compliance with the section 404(b)(1) permit review guidelines.

While the section 404(b)(1) guidelines do not expressly require that general permits comply with the "practicable alternatives" test of 40 CFR 230.10(a), (see 40 CFR 230.7(b)(1)), compliance with some form of alternatives test is a critical prerequisite to ensure avoidance of environmental impacts. The MDSPGP partially addresses this in Part IV. Programmatic General Permit Conditions, C. Minimization of Environmental Impacts, which provides that "discharges of dredged, fill or excavated material into waters of the U.S. shall be avoided and minimized to the maximum extent practicable on-site". However, these criteria are more likely to be construed as a limitation upon how an authorized activity is conducted rather than a requirement for consideration of different activities or no activity at all (the no-build alternative). The screening criteria should be modified, both in the description of procedures and through addition of a general condition, to clearly prohibit authorization of any activity where there is a practicable alternative which would have a less adverse impact on the aquatic ecosystem.

The permit contains no specific requirement for compensatory mitigation.

The MDSPGP does not contain a provision requiring compensatory mitigation to replace wetlands functions lost as a result of authorized impacts. While the State permit process has compensatory mitigation provisions for certain activities, it is not clear whether these

will meet Federal standards and Administration policies for no net loss of wetland functions. Since compensatory mitigation is not specifically required, it will be difficult for the District Engineer to use it to minimize the net impacts of a general permit authorization.

Other Procedural Concerns

- One of the primary objectives for establishing an SPGP is to replace and regionalize the sometimes confusing array of nationwide permits with a single tiered SPGP. Therefore, to realize the full environmental and efficiency benefits of a SPGP, the NWP's and other general permits in effect should be revoked concurrent with the issuance of the SPGP. The Corps draft Programmatic General Permit Regulatory Guidance Letter indicates that it is appropriate to suspend or revoke NWPs when the activities authorized by such permits will be covered by the SPGP. We agree with this conclusion, and believe that a clear, unambiguous statement of intent to revoke nationwide permits in Maryland should be included in the MDSPGP.
- The MDSPGP will be authorized for a period of 5 years. During that time, significant changes in State rules, regulations, and policies may occur. Depending on their magnitude, such changes should trigger a thorough re-evaluation of the MDSPGP. The MDSPGP and Attachment 12 to the MDSPGP's draft standard operating procedures outline a process for dealing with changes to State regulations. They provide that all proposed changes to State Program Regulations, laws, or policies will be reviewed by the Corps and coordinated with Federal resource agencies. The Corps will determine whether or not public notice is required, or can be handled administratively, and then decide consistency with the MDSPGP.

The draft standard operating procedures also reference State general permits, a topic not included in the MDSPGP. The standard operating procedures provide that the Corps will determine their applicability under the MDSPGP and that the Corps and the State will coordinate, as appropriate, with other resource agencies and the public.

Both documents should be revised. The MDSPGP should address the issues of review of proposed State general permits. Changes in State laws, regulations, or policies, including exemptions, review thresholds, mitigation requirements, or alternatives analyses, should require a public notice to provide the opportunity to gather information for a thorough analysis of the implications of these changes on the MDSPGP. The review procedures should also be made applicable to any proposed State general permits, including proposed programmatic permits.

- The State program allows delegation of State authorities to counties that enact nontidal wetlands programs. No county program information was included in the public notice. Therefore, the MDSPGP should not apply to delegated programs unless such programs are first subject to full Federal agency and public review, and are determined to comply with existing Federal standards.

In general, we are concerned that, due to the synergy between State and Federal wetlands protection programs, a relaxation of Federal standards may trigger a relaxation of State standards. For example, following last year's authorization of an SPGP in Pennsylvania having a 5,000 square foot lower threshold, the Corps then introduced the 1/2-acre homeowner's nationwide permit (NWP 29). This nationwide allowed a homeowner to fill up to 1/2 acre of aquatic habitat/wetlands with few conditions, and without requiring pre-construction consultation with resource agencies. The Pennsylvania Department of Environmental Protection quickly followed suit, raising its counterpart general permit's lower threshold from 5,000 square feet to 1/2 acre, arguing that the State need not be more protective than the Federal government. In Maryland, legislation was introduced that would have prohibited the State from promulgating any regulations or policies more stringent than Federal requirements. The Governor has also issued an executive order to require analysis and justification whenever State requirements exceed those of the Federal government. Thus, if the Federal government places *de facto* reliance on more stringent State program standards, the program may ultimately be compromised.

Expected Development Pressure as a Predictor of Cumulative Impacts Under the MDSPGP

Maryland is located in the middle of the densely populated northeast corridor. Low-density development is the fastest growing land use in Maryland, with a 37 percent increase from 1985 to 1990, encompassing 101,000 acres. Total development during the same period increased by 19 percent, totalling 144,500 acres. The fastest rates of growth are in fringe jurisdictions and rural counties outside traditional metropolitan areas. Agriculture and forest resources have been lost at unprecedented rates. Between 1985 and 1990, 74,000 acres of agricultural lands and 71,000 acres of forest lands were lost to development. Four counties (Calvert, Cecil, Charles and Hartford) show high acreage being developed, with a more than 30 percent increase in the rate of development. The most common cause of these losses has been roads, housing, and commercial construction. The four counties contain 17,372 acres of tidal and 41,341 acres of palustrine wetlands that will be subjected to continued and increasing development pressure.

Five other counties (Caroline, Kent, Queen Annes, Somerset and Talbot) show a greater than 30 percent increase in the rate of development during the period 1985-1990. The latter counties are on the Eastern Shore, and support a total of 86,469 acres of tidal wetlands and 92,785 acres of palustrine wetlands that will continue to be subject to accelerated development pressure. It is becoming clear that, based on the declining acreage of available uplands, development interests will increasingly turn to wetlands as building sites.

Table 1 provides a list of high-growth counties adjacent to the Chesapeake Bay where there are also abundant and high value wetland resources that are likely to be at increased risk if regulatory requirements are reduced.

RECOMMENDATIONS

The Department will support issuance of the MDSPGP provided that the District is directed to modify the proposed permit and its implementing procedures to address our concerns:

1. Complete and publish a thorough assessment of the potential individual and cumulative impacts of the categories of activities to be regulated under the proposed permit before its authorization. The section 404(b)(1) guidelines provide that, "[T]he evaluation must be completed before any general permit is issued, and the results must be published with the general permit....The evaluation shall include a precise description of the activities to be permitted under the general permit, explaining why they are sufficiently similar in nature and in environmental impact to warrant regulation under a single general permit, based on Subparts C through F..." (40 CFR 230.7(b)(1)-(3)).
2. Establish an upper threshold for wetland impacts of less than one acre to limit authorizations to projects with minimal individual and cumulative adverse effects.
3. Develop a revised and simplified table of categories of activities based on across-the-board Federal standards, as in the State Program General Permits of New Hampshire, Maine, and Massachusetts. We recommend a single lower threshold of 5,000 square feet exclusive of salt marshes and other sensitive areas (such as vernal ponds), and recommend that all permanent fill in salt marsh require an individual permit.
4. Establish a quick and automatic resource agency kick-out to ensure that projects with the potential to adversely affect resources of Federal interest are scrutinized, and that permit applicants will be notified as soon as possible whether there will be additional requirements for authorization.
5. Establish stronger permit conditions to ensure that a comprehensive range of alternatives is examined prior to authorization of wetland fills, and with a requirement that replacement of values and functions are provided for through compensatory mitigation.
6. Institute a trial period for use of the permit to allow State and Federal agencies to monitor its effectiveness, and make adjustments as necessary.
7. State clearly that no project may receive authorization under this general permit which does not, at a minimum, receive State review and authorization.
8. Include a commitment to revoke nationwide or other general permits in the State that involve discharges of dredged or fill material.

9. Clarify that this permit does not apply to any part of the State program delegated to a county, unless such programs are first subject to full Federal agency and public review, and are determined to comply with existing Federal requirements.
10. Modify Attachment 12 to include Federal interagency review and notice of any new State general permits.

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Table 1. Wetland resources in high growth counties containing significant fish and wildlife resources (Data from Tiner and Burke, 1995; Maryland Office of Planning, 1991).

WETLANDS

COUNTY	estuarine	palustrine	% of area	Note
Anne Arundel	2,774	13,202	6.0	*
Baltimore	2,491	3,384	1.6	*
Calvert	3,630	7,077	7.9	o*
Caroline	2,121	28,027	14.9	o
Cecil	2,184	6,646	3.9	o*
Charles	4,909	21,755	9.2	o*
Hartford	6,649	5,863	4.4	o*
Kent	3,706	11,570	8.6	o
Prince Charles	2,019	17,309	6.3	*
Queen Annes	8,453	24,040	13.7	o
Somerset	62,408	19,155	37.7	o
Talbot	9,781	9,993	12.0	o

o - high rate of change (greater than 30% between 1985 and 1990)

* - high number of acres developed