



## MMTA Government Relations and Legal ENEWS - 022415

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Post Boat Show, post-recent-blizzard/snowstorm greetings from a very snowy Beacon Hill. We hope your facilities and staff are in restored health and order after this constant deluge of snow and winter weather aftermath. Please feel welcome to tell us your challenges, especially systematic issues we could help with, especially as you contemplate repairs to in-water and onshore facilities. Sadly, not surprisingly, much restoration work is not free of bureaucratic expectations, some of which are shockingly punitive rather than helpful, and may merit a strategic consultation.

### LEGISLATIVE AND EXECUTIVE BRANCH NEWS:

Our usual parsing and tracking of all 5,000 bills is well underway, and the bills we filed proactively are ready for the hearing schedule to be released. A subsequent ENEWS will address those bills. There have been some significant leadership changes on Beacon Hill in the New Year. We are particularly pleased to report the Legislative Boating Caucus Co-Chair, **Senator Anthony Petruccelli** (D-1st Suffolk and Middlesex) is the new Majority Whip and Representative **Susan Gifford** (R-2<sup>nd</sup> Plymouth) is an Assistant Minority Leader. Martin Suuberg, a longtime friend, is the new Commissioner of the Department of Environmental Protection, all providing MMTA with even stronger relationships on Beacon Hill.

### ARMY CORPS WEBINAR AND NEWLY ISSUED PERMITS:

One such regulatory program is the **U.S. Army Corps of Engineers Massachusetts General Permits ("Army Corps MAGP")**, just finalized by the Corps as the replacement for the previous Massachusetts Programmatic General Permit. MMTA lobbied extensively albeit suddenly for changes from the original drafts and many, many responsive changes were made. The new Army Corps MAGP in its entirety is available by clicking 'Read More' below.

**The Army Corps has planned an outreach webinar for the Mass Marine Trades Association (and a few Harbormasters) on these new General Permits for Wednesday March 4, 2015 from 10:00 a.m. until 12:00 p.m.** If you cannot participate please review [GPs\\_for\\_MA\\_-\\_webinars.pdf](#) for other webinar times.

This is a great opportunity to hear the Army Corps' perspective on the new General Permits, ask questions of knowledgeable Army Corps staff and talk through this complex permitting program. We highly encourage you to "attend" the free webinar. Questions can be posed generically without identifying your facility. You can also email or call Jamy Madeja in advance if you have specific concerns. **PLEASE MUTE YOUR PHONE AND DO**

**NOT PUT THE CALL ON HOLD IF YOUR FACILITY USES MUSIC FOR HOLD CALLS.**

To access the audio portion of the webinar dial (877) 873-8017;

Enter access code: 2020336;

Enter security code: 8862

To access the visual portion of the webinar, go to: <https://www.webmeeting.att.com>

Enter meeting number: 877-873-8017

Enter access code: 2020336

If you do attend, it has been suggested that you call in and log on approximately 10 minutes before the webinar begins as you may need to download software.

Because this is an MMTA tailored call we will be focusing on General Permit 2 concerning Moorings; General Permit 3 concerning Pile-Supported Structures, Floats and Lifts; and General Permit 5 concerning Dredging. **Questions are encouraged during the webinar.**

#### **MMTA'S SUMMARY OF THE NEW ARMY CORPS MAGP**

##### **U.S. Army Corps of Engineers, Massachusetts General Permits (2015)**

###### **First, Some Good News:**

The major effort MMTA members put out to change the Army Corps' approach to its intended revisions to permitting moorings and in-water structures has been substantially successful. The newly issued General Permit, for use in Massachusetts only, not New England-wide, is still written worse than a translated technical manual for building a Japanese car from scratch. Substantively, however, it is vastly improved. Among other things, the Army Corps is now clear that only the owner of a physical mooring can be permitted by the Corps, which is the case for the vast majority of MMTA members in need of clear control of the moorings they've owned and managed for decades.

If your Boating Facility moorings were first put in place prior to January 20, 2010, the Army Corps considers them "Previously Authorized" by the Army Corps, whether or not you have a piece of paper from the Army Corps saying so. This means that in general, any maintenance, including replacement, of previously authorized moorings **does not require a notification form to the Army Corps**. You can perform the maintenance and/or replacement at your convenience so long as the work is in accordance with the terms and conditions of the original authorization. The caveat of "in general" is in the above sentence because if your local Harbormaster has not previously issued approvals for the moorings, things may get dicey, but then they are dicey anyway if one lacks local Harbormaster approval. You knew that already.

###### **Second, A Rough Outline on Corps Procedure:**

Much like the old, now-expired Programmatic General Permit, the "Massachusetts General Permits" designates two types of permit applications for somewhat easier application for moorings, in-water structures, dredging and 23 total types of regulated work, and a third, usual Individual Permit application. Depending on the size, location and type of work you are contemplating, applicants potentially obtain coverage under the **Self-Verification (SV)** process, or alternatively under the **Pre-Construction Notification (PCN)** process. That said, if your project cannot meet the standards delineated within the Army Corps MGPs, for example an entirely new boating facility or dredging greater than 10,000 cubic yards, you would need to apply for an **Individual Permit**.

**The Self Verification process requires only that you provide notification to the Corps before your work**

**commences. You may get no reply and certainly will not receive written approval back again in most circumstances (occasionally an attorney or consultant can manage an emailed acknowledgment, for example).** A "Self Verification Notification Form" for eligible work is completed and delivered to the Corps. Basic site location, applicant and contractor contact information must be provided, as well as dates the work is to start and finish and a description of the work being done. You may commence work without written verification from the Corps so long as you have submitted the Notification Form prior to starting work. **By signing the Self Verification Notification Form you are also acknowledging that the work complies with the many "General Conditions" of the General Permit.** Please remember that other State and Local entities (e.g. MassDEP, Local Conservation Commission) may have jurisdiction and require their approval of your work, as well. This is true for any permit you seek. Please also remember to save a copy of what you sent in.

**Pre-Construction Notification requires Corps approval before work can commence. We recommend anticipating 3-4 months for PCN approval,** and then being pleasantly surprised if it is done faster. To our knowledge, no new staff is being added for processing applications, however, and major new education/awareness is happening, which should result in more applications. Pre-Construction Notification is for projects more substantial than those eligible for Self-Verification, for example **expansions of existing, approved in-water structures or to establish a reconfiguration zone allowing one to move around docks and the like within a specified area without future Corps approval.** Submitting a PCN is substantially more involved than Self-Verification because it requires providing drawings/plans, delineation of wetlands and/or Special Aquatic Sites (see description below), detailed narrative of information required by certain General Conditions and Corps notification to all abutters. The Corps may require additional information which they deem essential to the public interest, and the killer is the Corps can still decide they prefer to see an Individual Permit application if you apply under this category, so do not apply using this PCN category unless you also leave plenty of time in case the Corps decides to require an Individual Permit. **The worst enforcement situation is when you have already shown you know Corps approval is required, asked for it, been told you don't have it yet, and then you blatantly go ahead with your project. Big fines. Consult an attorney, not just an educated engineer, if you face this potential situation, to assure attorney-client privilege (confidentiality) for your advice discussions.**

The New Army Corps MassGPs expire on February 4, 2020. **Activities authorized by these Corps Mass General Permits that have either commenced (i.e., are under construction) or are under contract to commence before February 4, 2020 will have until February 4, 2021 to complete the activity under the terms and conditions of the current GPs.** If work is not completed by February 4, 2021, you must contact the Corps to request continued authorization after that date. Activities approved and completed under these 2015 Corps Mass General Permits will remain authorized and not require new approvals to stay in place.

A quick note regarding **Individual Permits.** Individual Permits for structures or other activities "of a permanent nature" are usually issued with no expiration date cited. However, where a temporary structure is authorized, or where restoration of a waterway is contemplated, the permit will be of limited duration with a definite expiration date. In general, for marinas and boatyards, the "asset" of an Individual Permit is worth obtaining when the application time allows you to do so, despite the duration and complexity of the application, if you contemplate a sale or refinancing of your facility at some point or need a long time to phase work or fear future competition for the same in-water space use or future opposition from any source which you could overcome or not encounter if you applied now for an Individual Permit.

#### **More Details:**

The Army Corps Massachusetts General Permits technically include 23 different "General Permits", for 23 categories of work. Three examples are "Repair, Replacement and Maintenance of Authorized Structures and Fills", "Moorings", and "Pile-Supported Structures, Floats and Lifts". As with the prior Corps permits, each permit includes thresholds for Self-Verification and Pre-Construction Notice eligibility and, by default, which activities require Individual Permits. Sadly, the thresholds are much more challenging to parse through and understand than they should be. For example, if you have a prior Army Corps permit for a bulkhead that now needs repairs you are likely Self-Verification eligible (no waiting for approval after submission) UNLESS the repair would cause permanent impacts to mudflats in which case you would need to submit a Pre-Construction Notification (wait for approval after submission), UNLESS the repairs impact more than 1,000 square feet of mudflats, which would require an Individual Permit.

### **Of Note to MMTA Membership:**

Many of the Corps General Permits reference impacts to "Special Aquatic Sites" ("SAS"). SAS generally consist of wetlands, mud flats, vegetated shallows, sanctuaries and refuges, coral reefs, and riffle and pool complex. **When preparing an application, the project proponent is responsible for conducting an adequate site-specific survey to verify that SAS are not present. It is our understanding that moorings currently in SAS may remain there, and be maintained, but new ones in any SAS must at least go through the Pre-Construction Notification process if not an Individual Permit before being placed. In Special Aquatic Sites, there will be a debate about whether so-called low impact moorings should be required for new, not previously authorized moorings.**

Section IX, Part A of the MAGP contains a number of additional Massachusetts-specific requirements. Please also review those supplemental General Permits and General Conditions found on Pages 54-60. The most relevant is for pile-supported structures in tidal, navigable waters: less than 600 sq ft combined is eligible for Self-Verification. Modestly sized structures in non-tidal navigable waters such as rivers are also eligible for Self-Verification. Also, maintenance dredging with upland disposal of certain types are similarly eligible.

### **Repair, Replacement and Maintenance of Authorized Structures and Fills:**

The Corps permits certain repair, replacement and maintenance of authorized Structures and fill in this particular Corps Mass General Permit. Authorized Structures are those authorized by the Army Corps. Here's where you need to do your homework and locate any prior Army Corps or State approvals for structures or fill. In some situations old structures, without specific Army Corps approval, may still be considered Authorized Structures. For example, structures or work completed before December 18, 1968, or in waterbodies over which the Army Corps had not asserted jurisdiction at the time the activity occurred, provided in both instances, there is no interference with navigation. Also, activities that were completed shoreward of applicable Federal Harbor lines before May 27, 1970 do not require specific authorization. Locating any prior approvals can aid in establishing when a structure was completed. Keep in mind that structures or fill may not be put to uses differing from those uses specified in the original permit or the most recently authorized modification. Structures or fill damaged by storms, fires, etc. may be eligible under this general permit for repair or replacement within two years of the date of their destruction or damage. Much as we pressed the Corps for a specific date, such as the one included for moorings (2010), none has yet been released in print. We're on it!

Broadly speaking:

- Repairs or replacement may be SV eligible so long as there are no permanent impacts to SAS and no expansion (e.g., structures) or new discharges of dredged or fill material (i.e., outside of the previously authorized footprint);
- Modest expansion or structures or fill may be PCN eligible but even fill less than  $\leq 100$  square feet in vegetated shallows might require compensatory mitigation and  $\geq 100$  square feet would require an Individual Permit.

### **Moorings:**

If your facility has moorings, again you need to do some homework. Spend some time locating ANY prior approvals for these moorings; that means Army Corps, Commonwealth of Massachusetts or Harbormaster approval. As noted above, **if your moorings were installed or relocated prior to January 20, 2010, the Army Corps considers them Previously Authorized.** This means that any maintenance, including replacement, of previously authorized moorings does not require a SV notification form. You can perform the maintenance and/or replacement at your convenience so long as the work is in accordance with the terms and conditions of the original authorization.

Broadly speaking:

- Existing boating facilities need to submit a PCN for any new moorings, new boating facilities would

need to submit an Individual Permit application;

- Any new moorings in vegetated shallows may need to employ low impact mooring technology (low impact mooring technology prevents any part of the tackle from dragging on the bottom during the tidal cycle). This will be a debate in each situation. We have had to educate the Corps and its allies in the Division of Marine Fisheries about the fact that one should not mix certain types of moorings into an existing field, and about safety concerns with some of the new "low impact" moorings, despite their well-intentioned purposes;
- Individual mooring owners can submit a SV notification if they have Harbormaster approval for their new mooring but only if the individual uses low impact mooring technology if located in SAS. To not use a low impact mooring, the individual would have to apply under the Pre-Construction Notification process.

### **Pile-Supported Structures, Floats and Lifts:**

As always, you need some form of Army Corps approval for nearly any structure in navigable waters. For existing and approved boating facilities, this likely means expansions, reconfigurations, reconfiguration zones, or modifications require PCN approval. Municipal and community facilities must also meet these PCN requirements. In tidal waters, structures less than 600 square feet (<300 square feet in non-tidal waters), NOT located over SAS and floats in tidal water  $\geq 18$  inches above the substrate at any time may be SV eligible. Otherwise, you'll need to submit a PCN. Oddly enough, where your Massachusetts issued Chapter 91 license may require you install benches or other public amenities, if those amenities are over tidal water the Corps requires you submit an Individual Permit application; you would not be eligible for the PCN process.

### **Dredging:**

Improvement (new) dredging is not SV eligible. Maintenance dredging  $\leq \frac{1}{2}$  acre with upland disposal and **no impacts to tidal SAS or intertidal areas** may be SV eligible.

Maintenance dredging  $\geq \frac{1}{2}$  acre and improvement dredging of  $\leq \frac{1}{2}$  acre **and** <10,000 Cubic Yards; **or**  $\leq 1000$  Square Feet of impacts to intertidal areas, **or**  $\leq 1000$  Square Feet of impacts to tidal SAS excluding vegetated shallows, **or**  $\leq 100$  Square Feet of impacts to vegetated shallows may be PCN eligible. Greater volumes of dredged materials or with greater impacts to SAS would likely require an Individual Permit.

There are numerous Time of Year restrictions for dredging and other projects with associated "discharges". Please do anticipate a very narrow window of time during which such projects may be pursued. We are pleased that the Time of Year restrictions correspond with the ones already in place instead of adding new ones, at least. Please let us know if you believe the Time of Year restrictions are not based in adequate facts for work in your particular geographic area and we will do what we can to seek revisions or waivers systemically.

### **Bank and Shoreline Stabilization:**

For this category, have an engineer review the Army Corps requirements for General Permit eligibility as slope characteristics may determine the necessary Corps approval. Again, only very limited projects can be pursued with SV.

### **Aids to Navigation:**

There are oddball and somewhat nonsensical requirements by the Corps to seek their approval for aids to navigation such as race marks placed by a sailing/yacht club, buoys delineating an approach to your facility or mooring field even if placed only for a few hours, which means massive non-compliance may be forthcoming. If your marks are in the water for more than 30 days without Coast Guard approval, however, you need to submit a PCN and gain Corps approval prior to placing the mark. Marks with Coast Guard approval OR in the water less than 30 days should be SV eligible.

### **Emergency Situations:**

The Corps offers no clear guidance for approval of work during emergency situations, an unfortunate problem where these types of situations seem to occur with greater frequency, such as this past month. The Corps states only that you must contact them for information on the application and approval process during emergency situations. And yet, once having contacted them, one's hands are tied with respect to doing the necessary work legally if the Corps doesn't say "go ahead". The Corps states they will "work with all applicable agencies to expedite verification according to established procedures in emergency situations." An attorney-client privileged discussion prior to making a call is advisable.

Recall that both Chapter 91 and the Wetlands Protection Act have codified procedures for emergency situations and emergency repairs may require approval by MassDEP and the local conservation commission.

That's most of the news fit to print! Best wishes for a busy, safe and successful boating season in 2015.

**Read more**