

Corps, NMFS, and FWS Opportunities for More Efficient Permitting of Commercial Shellfish Aquaculture under General Permits

This Fact Sheet provides information about permits issued by the U.S. Army Corps of Engineers (Corps) for commercial shellfish aquaculture. Once in place, a Corps General Permit provides a simplified alternative to an individual Corps permit for eligible commercial shellfish aquaculture farms. Although a commercial shellfish farm must meet additional federal, state, local, and tribal requirements, the General Permit provides a streamlined approach to fulfilling the main regulatory requirements under federal laws and regulations. This Fact Sheet was developed primarily as a reference for federal agencies involved in the permitting process and focuses on the General Permit procedural issues related to Endangered Species Act and Essential Fish Habitat compliance.

The Corps' Permitting Authority in Context

The initial start-up of a commercial shellfish aquaculture farm in the United States is subject to multiple regulatory requirements under federal, state, tribal, and local authorities. In addition to a Corps permit under the Rivers and Harbors Act (Section 10) and the Clean Water Act (Section 404), a commercial shellfish aquaculture farm must obtain all other required permits from the appropriate federal, state, local, or tribal authority. Examples includes leases and permits from state agencies and permits from other federal agencies under the Magnuson-Stevens Fishery Conservation and Management Act (for harvesting of some shellfish species in federal waters of the Exclusive Economic Zone); the National Marine Sanctuaries Act (for shellfish operations within a national marine sanctuary); Marine Mammal Protection Act (for shellfish aquaculture operations that may harm marine mammals); Migratory Bird Treaty Act (for shellfish aquaculture operations that may harm migratory birds); and other statutes.

Federal Requirements Addressed by the Corps' Regulatory Program

The Corps permit for commercial shellfish aquaculture directly addresses requirements under two federal laws:

- Rivers and Harbors Act – Section 10 of this law regulates activities and/or structures in, on, over, or under navigable waters of the United States. The Corps permit authorizes activities such as the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures in navigable waters of the United States. The primary focus is on the potential for these activities to interfere with other activities in navigable waters.
- Clean Water Act (CWA) – Section 404 of this law regulates discharges of dredged and/or fill material into waters of the United States. As it relates to aquaculture operations, the Corps permit authorizes activities such as shellfish seeding, rearing, cultivating, transplanting, and harvesting. The primary focus is on the potential effects of these activities on the chemical, physical, and biological integrity of waters of the United States.

As part of the process for issuing a permit for commercial shellfish aquaculture under these two laws, the Corps consults and coordinates with other federal agencies, coastal states, tribes, the public, and other parties, as appropriate, to meet additional legal requirements, including but not limited to the following:

- National Environmental Policy Act (NEPA) – This law may require the Corps to prepare an environmental assessment or an environmental impact statement on the effects of shellfish aquaculture activities.
- Treaties – The Corps is required to consult with Federally recognized tribes if the activities requiring authorization have the potential to significantly affect protected tribal resources, tribal rights (including treaty rights) and Indian lands. The Corps may not authorize an activity that impairs

reserved tribal rights. These rights include, but are not limited to, reserved water rights and treaty fishing and hunting rights.

- Endangered Species Act (ESA) – Section 7 of this law requires the Corps to consult with the National Marine Fisheries Service (NMFS) and/or the Fish and Wildlife Service (FWS) if a proposed federal action has the potential to adversely affect an ESA-listed species and/or the designated critical habitat for an ESA-listed species. The focus of these consultations is on the likelihood that the shellfish aquaculture activities authorized under the Corps’ permit would jeopardize ESA-listed species or result in the destruction or adverse modification of their critical habitat.
- Magnuson-Stevens Fishery Conservation and Management Act – The Essential Fish Habitat (EFH) provisions of this law require the Corps to consult with NMFS if a proposed federal action has the potential to adversely affect the habitat of wild fish stocks managed by NMFS. The focus of these consultations is on the potential for activities authorized under the Corps’ permit to adversely affect EFH. One example of EFH is submerged aquatic vegetation in nearshore areas where most U.S. shellfish aquaculture production currently takes place.
- Coastal Zone Management Act– The federal consistency provisions of this law require state certification that the activities authorized by the Corps’ permit comply with the enforceable policies of approved state coastal zone management programs and that these activities will be conducted in a manner consistent with the program.
- Clean Water Act – Section 401 of this law requires state or tribal certification that the activities authorized by the Corps’ permit comply with water quality standards.
- National Historic Preservation Act – Section 106 of this law requires the Corps to consult with the State Historic Preservation Officer or Tribal Historic Preservation Officer if the shellfish aquaculture activities authorized by the permit may affect historic properties or areas of historic or cultural significance.
- Fish and Wildlife Coordination Act – This law requires the Corps to consult with FWS, NMFS, and appropriate state agencies if the shellfish aquaculture activities authorized by the permit would modify a body of water in ways that could potentially harm fish and wildlife resources.
- National Marine Sanctuaries Act – Section 304(d) of this law requires the Corps to consult with the National Marine Sanctuary Program if the shellfish aquaculture activities authorized by the permit are likely to destroy or injure any sanctuary resource (for Stellwagen Bank National Marine Sanctuary, such consultations are required for action that “may affect” that sanctuary - a lower threshold).

Types of General Permits Available under the Corps’ Regulatory Program

General permits may be developed for any category of activity involving structures and/or work in or affecting navigable waters and/or discharges of dredged or fill material into waters of the United States, provided the activities are similar in nature, and will cause only minimal adverse environmental effects when performed separately and cumulatively. A general permit may be issued for a period of up to five years. Before it may be re-issued, a general permit must be reevaluated to assess whether revocation or modification is necessary to ensure it continues to authorize activities that cause no more than minimal adverse effects.

The Corps issues three types of general permits: Nationwide Permits, Regional General Permits, and State Programmatic General Permits.

- Nationwide Permits (NWP) – NWPs are promulgated at Corps Headquarters following a public interest review (which includes opportunity for public comment and coordination with other agencies); documentation of the environmental considerations necessary to comply with the National Environmental Policy Act (NEPA); and an impact analysis consistent with the requirements of Environmental Protection Agency (EPA) Section 404(b)(1) Guidelines, if applicable. General Conditions for the NWPs are developed at Corps Headquarters and apply to the entire NWP Program. Division commanders in cooperation with district engineers then develop regional conditions based on regional resources of concern to ensure use of the NWP in particular areas does not result in more than minimal adverse effects. Through public notices, Districts solicit comments and feedback on the proposed conditions from state and federal agencies and the public before submitting them to the Division Engineer for approval.
- Regional General Permits (RGPs) – RGPs are developed by districts or divisions in coordination with the public and other agencies and can be designed for a category of activities that are specific to a certain part of the region (e.g. waterbody, watershed, county, state, etc.). Districts may suspend the use of some or all NWPs and develop RGPs instead. Documentation procedures for issuance of an RGP are similar to those described above for NWPs.
- Programmatic General Permits (PGPs) – PGPs are developed jointly by the Corps and a state or local regulatory agency wherein the state or local agency evaluates actions covered by the PGP and verifies on behalf of the Corps that activities meet the terms and conditions of that PGP. In some cases, notification to the Corps may still be required if certain thresholds/triggers are reached.

Individual Permits

Consistent with procedures in the Corps implementing regulations, individual permit evaluation must be conducted for proposals that exceed the limitations of or do not comply with the terms and conditions of available general permits. The Corps issues two types of Individual Permits: Standard Permits and Letters of Permission.

- Standard Permits – The process for evaluating a Standard Permit application includes a public notice and receipt and evaluation of public comments, and may include a public hearing if requested and deemed necessary by the District Engineer.
- Letters of Permission – Letters of Permission are typically less controversial actions with minor impacts that cannot be authorized by existing general permits. Abbreviated coordination (i.e., no public notice, but coordination with state and federal regulatory and resource agencies) is conducted on a case-by-case basis. Individual documents to demonstrate compliance with NEPA and the EPA 404(b)(1) Guidelines, if applicable, must be developed for activities reviewed pursuant to standard permit procedures.

General Permits for Commercial Shellfish Aquaculture

Commercial shellfish aquaculture may be authorized under Nationwide Permit 48 or other types of general permits. A state-by-state summary of the general permits available for commercial shellfish is available via the NMFS Office of Aquaculture shellfish portal at www.nmfs.noaa.gov/aquaculture/

Once in place, a general permit for commercial shellfish aquaculture provides clear advantages for both federal agencies and the regulated industry. Commercial shellfish aquaculture projects that meet the terms and condition of a Corps aquaculture general permit can be authorized more quickly because the most common concerns about the potential impacts of shellfish aquaculture will have already been addressed programmatically, before an individual request for authorization is considered. This reduces federal agency workload and provides more timely permitting decisions to the project applicant.

The challenge for the Corps and other federal agencies, however, is the significant upfront investment required to ensure that the general permit complies with the multiple statutory requirements described earlier in this Fact Sheet. One of the biggest challenges is completing required consultations to assess the potential impacts of shellfish aquaculture on ESA-listed species, critical habitat for ESA-listed species, and essential fish habitat, including the development of appropriate terms and conditions to avoid, minimize, or mitigate adverse impacts based on the best scientific information available. However, the expectation is that, over time, the necessary steps will proceed more smoothly with each 5-year re-authorization due to the combination of existing scientific information and monitoring results over the previous 5 years.

The Figure on the next two pages provides an example of the ESA and EFH processes associated with the General Permits, including:

- a generic depiction of the multiple steps required to complete ESA and EFH consultations on a general permit (Part 1)
- the simplified process for authorizing an individual commercial shellfish project once the general permit is in place (Part 2), and
- the need for a general permit to be re-authorized every 5 years (Part 3).

Potential Areas for Increased Efficiencies in Aquaculture Permitting

Federal agencies, through the Interagency Working Group on Aquaculture, are working on additional ways to achieve more efficient permitting of commercial shellfish aquaculture, including:

1. Preparing Programmatic Biological Opinions for more efficient aquaculture permit reviews related to ESA compliance.
2. Researching and making available existing aquaculture best management practices (or BMPs) that can be used by aquaculture applicants during project planning and in discussions between federal agencies during consultations.
3. Regularly reviewing, updating, and disseminating this Fact Sheet as well as a “Shellfish Grower’s Introduction to Permitting” document designed to facilitate submittal of more complete permit applications, reducing the applicant’s wait time between original submittal and permit decision.

ESA and EFH Procedures Associated with Shellfish Aquaculture Permitting Under a Corps General Permit

Part 1 – Consultations for Issuance of General Permit: Consultations on general permits address potential ESA and EFH issues with shellfish aquaculture activities before specific projects are considered for authorization. Consultations result in a list of permit conditions to avoid, minimize, or mitigate adverse impacts on ESA and EFH. Consultations provide valuable information to shellfish growers about the types of projects and locations that potentially can be authorized under the general permit. EFH & ESA consultations are completed by the regional offices of NMFS and FWS and the District offices of the Corps.

Pre-consultation coordination

(ESA/EFH) Corps meets with NMFS & FWS before initiating consultation.

PURPOSE:

1. Identify potential impacts of shellfish aquaculture activities on ESA species, critical habitat & EFH in locations covered by a Corps general permit.
2. Share information on how adverse impacts can be avoided, minimized, or mitigated.

PREFERRED APPROACH: Corps shares draft consultation document(s) with NMFS/FWS:

1. Draft BA(s) for ESA consultation(s) with NMFS and/or FWS
2. Draft EFH Assessment for NMFS (combined with the BA if possible)

Other required reviews

(processes not detailed in this flowchart)

Initiation of ESA/EFH consultation(s)

1. Corps submits final BA(s) to NMFS and/or FWS and final EFH assessment to NMFS.
2. Corps briefs NMFS and/or FWS and responds to requests for additional information.
3. NMFS and/or FWS deem the documents "complete", starting the clock for completing consultation within targeted regulatory timelines.

"Not likely to adversely affect ESA"
"Does not have the potential to cause substantial adverse effects on EFH"

"Likely to adversely affect ESA"
"Would result in substantial adverse effects to EFH"

Informal ESA Consultation (~30 days)
Abbreviated EFH consultation (30 days)

1. NMFS and/or FWS send concurrence letter(s) to Corps to complete ESA consultation(s).
2. NMFS sends CRs to Corps to complete EFH consultation

PREFERRED APPROACH: NMFS combines its ESA and EFH consultations and includes CRs in the ESA concurrence letter.

Formal ESA Consultation (135 days)
Expanded EFH Consultation (60 days)

1. NMFS and/or FWS send draft BiOp(s) to Corps.
2. NMFS sends draft CRs to Corps.
3. Corps responds to draft BiOp(s) and CRs.
4. NMFS and/or FWS send final BiOp(s) to Corps to complete ESA consultation.
5. NMFS sends final CRs to Corps to complete EFH consultation.

PREFERRED APPROACH: NMFS combines its ESA and EFH consultations and includes CRs in its draft and final BiOp. In this case, the timeline for completing the EFH consultation may be extended to coincide with the ESA schedule.

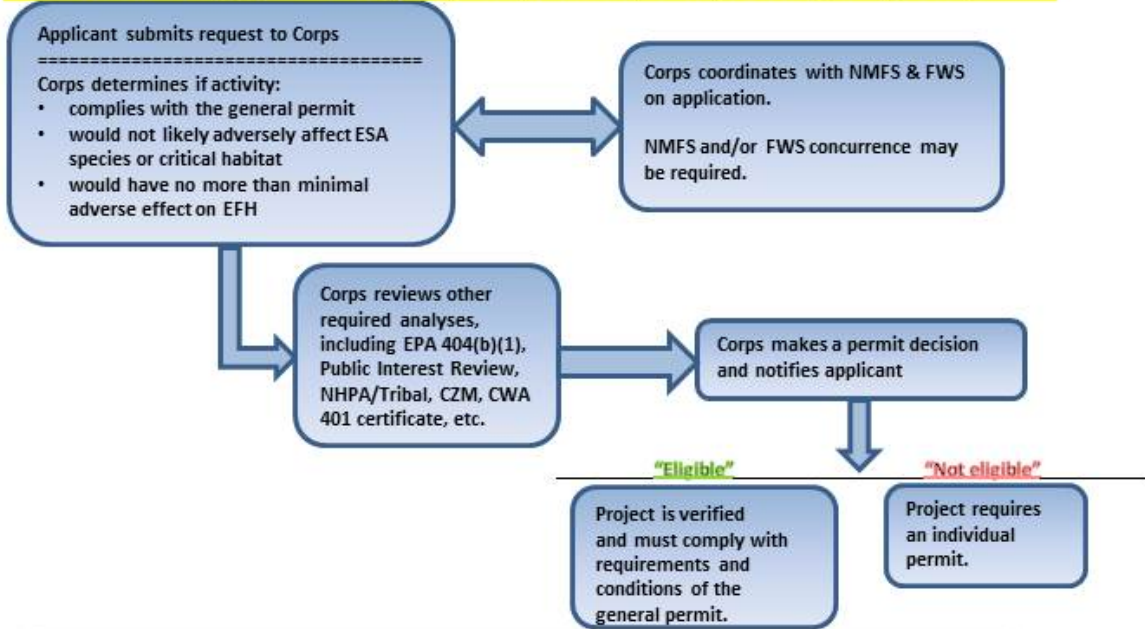
Key to abbreviations:
 BA = Biological Assessment
 BiOp = Biological Opinion
 Corps = U.S. Army Corps of Engineers
 CR = Conservation Recommendation
 CWA = Clean Water Act
 CZM = Coastal Zone Management
 EFH = Essential Fish Habitat
 EPA = Environmental Protection Agency
 ESA = Endangered Species Act
 FWS = U.S. Fish and Wildlife Service
 NHPA = National Historic Preservation Act
 NMFS = National Marine Fisheries Service

NOTE: Additional state, federal, and tribal requirements need to be met before the general permit can take effect.

ESA and EFH Procedures Associated with Shellfish Aquaculture Permitting Under a Corps General Permit

Part 2 – Verification of projects: Shellfish aquaculture activities that meet the general permit terms and conditions, including conditions resulting from the consultation(s) described in Part 1 and other consultations required under the Corps regulations, can be authorized relatively quickly once a general permit has been issued. Shellfish growers request their Corps' District Office verify that their proposed activity is eligible, and the Corps determines eligibility with input from NMFS and/or FWS (for ESA and EFH determinations) and other agencies, as appropriate.

Verification of projects under the general permit (within 45 days of receipt of a complete application)



Part 3 – Re-issuance of general permit: General permits may be authorized for no more than 5 years.

Re-issuance of general permit (every 5 years)

Corps, NMFS, FWS, and other agencies review results to inform the process for re-issuing the general permit.

- May revise the permit's scope, terms, and conditions based on monitoring of permitted activities.
- Information from monitoring will also assist in ESA and EFH consultations (described in Part 1).
- May explore state programmatic permit option as way to achieve further efficiencies.
- Public comments are solicited to help inform permit reissuance decision

PREFERRED APPROACH:

1. Agencies compile relevant information on an on-going basis, including changes in shellfish aquaculture technology and practices and research findings about impacts on species and habitat.
2. Agencies begin the pre-consultation process (described in Part 1) with sufficient lead time to ensure completion of required consultations prior to the permit renewal date. For a state programmatic permit, additional lead time will be needed to engage state partners.