

Regulatory Guidance Letter 93-01

SUBJECT: Provisional Permits

DATE: April 20, 1993

EXPIRES: December 31, 1998

1. **Purpose:** The purpose of this guidance is to establish a process that clarifies for applicants when the U.S. Army Corps of Engineers has completed its evaluation and at what point the applicant should contact the State concerning the status of the Section 401 Water Quality Certification and/or Coastal Zone Management (CZM) consistency concurrence. This process also allows for more accurate measurement of the total length of time spent by the Corps in evaluating permit applications (i.e., from receipt of a complete application until the Corps reaches a permit decision). For verification of authorization of activities under regional general permits, the Corps will use the appropriate nationwide permit procedures at 33 CFR 330.6.

2. Background:

- a. A Department of the Army permit involving a discharge of dredged or fill material cannot be issued until a State Section 401 Water Quality Certification has been issued or waived. Also, a Department of the Army permit cannot be issued for an activity within a State with a federally-approved Coastal Management Program when that activity that would occur within, or outside, a State's coastal zone will affect land or water uses or natural resources of the State's coastal zone, until the State concurs with the applicant's consistency determination, or concurrence is presumed. In many cases, the Corps completes its review before the State Section 401 Water Quality Certification or CZM concurrence requirements have been satisfied. In such cases, applicants and the public are often confused regarding who to deal with regarding resolution of any State issues.
- b. The "provisional permit" procedures described below will facilitate a formal communication between the Corps and the applicant to clearly indicate that the applicant should be in contact with the appropriate State agencies to satisfy the State 401 Water Quality Certification or CZM concurrence requirements. In addition, the procedures will allow for a more accurate measurement of the Corps permit evaluation time.

3. **Provisional Permit Procedures:** The provisional permit procedures are optional and may only be used in those cases where: i) the District Engineer (DE) has made a provisional individual permit decision that an individual permit should be issued, and, ii) the only action(s) preventing the issuance of that permit is that the State has not issued a required Section 401 Water Quality Certification (or waiver has not occurred) or the State has not concurred in the applicant's CZM consistency determination (or there is not a

presumed concurrence). In such cases, the DE may, using these optional procedures, send a provisional permit to the applicant.

- a. First, the DE will prepare and sign the provisional permit decision document. Then the provisional permit will be sent to the applicant by transmittal letter. (The sample transmittal letter at enclosure 1 contains the minimum information that must be provided.)
- b. Next, the applicant would obtain the Section 401 Water Quality Certification (or waiver) and/or CZM consistency concurrence (or presumed concurrence). Then the applicant would sign the provisional permit and return it to the DE along with the appropriate fee and the Section 401 Water Quality Certification (or proof of waiver) and/or the CZM consistency concurrence (or proof of presumed concurrence).
- c. Finally, the Corps would attach any Section 401 Water Quality Certification and/or CZM consistency concurrence to the provisional permit, then sign the provisional permit (which then becomes the issued final permit), and forward the permit to the applicant.
- d. This is the same basic process as the normal standard permit transmittal process except that the applicant is sent an unsigned permit (i.e., a provisional permit) prior to obtaining the Section 401 Water Quality Certification (or waiver) and/or CZM consistency concurrence (or presumed concurrence). (See enclosure 2.) A permit cannot be issued (i.e., signed by the Corps) until the Section 401 and CZM requirements are satisfied.

4. Provisional Permit: A provisional permit is a standard permit document with a cover sheet. The cover sheet must clearly indicate the following: that a provisional permit is enclosed, that the applicant must obtain the Section 401 Water Quality Certification or CZM concurrence from the State, that these documents must be sent to the Corps along with the provisional permit signed by the applicant, and that the Corps will issue the permit upon receipt of these materials. The issued permit is the provisional permit signed by the applicant and the Corps. The provisional permit must contain a statement indicating that the applicant is required to comply with the Section 401 Water Quality Certification, including any conditions, and/or the CZM consistency concurrence, including any conditions. At enclosure 3 is a sample cover sheet for the provisional permit.

5. Provisional Permit Decision: The DE may reach a final decision that a permit should be issued provided that the State issues a Section 401 Water Quality Certification and/or a CZM concurrence. In order to reach such a decision the DE must complete the normal standard permit evaluation process, prepare and sign a decision document, and prepare a standard permit, including any conditions or mitigation (i.e., a provisional permit). The decision document must include a statement that the DE has determined that the permit will be issued if the State issues a Section 401 Water Quality Certification or waiver and/or a CZM concurrence, or presumed concurrence. The standard permit will not contain a condition that requires or provides for the applicant to obtain a Section 401 Water Quality Certification and/or CZM concurrence. Once the decision document is

signed, the applicant has the right to a DA permit if the State issues a Section 401 Water Quality Certification or waiver and/or a CZM concurrence, or if concurrence is presumed. Once the decision document is signed, the permittee's right to proceed can only be changed by using the modification, suspension and revocation procedures of 33 CFR 325.7, unless the State denies the Section 401 Water Quality Certification or non-concurs with the applicant's CZM consistency determination.

6. Enforcement: In some cases, applicants might proceed with the project upon receipt of the provisional permit. The provisional permit is not a valid permit. In such cases, the Corps has a discretionary enforcement action to consider and should proceed as the DE determines to be appropriate. This occurs on occasion during the standard permit transmittal process. Since the Corps is not changing the normal process of sending unsigned permits to the applicant for signature, there should not be an increase in the occurrence of such unauthorized activities.

7. Modification:

- a. In most cases the Section 401 Water Quality Certification, including conditions, and/or CZM consistency concurrence, including conditions, will be consistent with the provisional permit. In such cases, the DE will simply sign the final permit and enclose the 401 Water Quality Certification and/or CZM consistency concurrence with the final permit (i.e., the signed provisional permit).
- b. In a few cases such State approval may necessitate modifications to the Corps preliminary permit decision. Such modifications will be processed in accordance with 33 CFR 325.7.
 1. When the modifications are minor and the DE agrees to such modifications, then a supplement to the provisional decision document may be prepared, as appropriate, and the permit issued with such modifications. (This should usually be done by enclosing the State 401 Water Quality Certification and/or CZM consistency concurrence to the permit, but in a few cases may require a revision to the permit document itself.)
 2. When the modification results in substantial change or measurable increase in adverse impacts or the Corps does not initially agree with the change, then the modification will be processed and counted as a separate permit action for reporting purposes. This may require a new public notice or additional coordination with appropriate Federal and/or state agencies. The provisional decision document will be supplemented or may be completely rewritten, as necessary.

8. Denial: If the State denies the Section 401 Water Quality Certification and/or the State non-concurs with the applicant's CZM consistency determination, then the Corps permit is denied without prejudice.

9. This guidance expires 31 December 1998 unless sooner revised or rescinded.

FOR THE DIRECTOR OF CIVIL WORKS:

JOHN P. ELMORE, P.E.
Chief, Operations, Construction and Readiness Division
Directorate of Civil Works

Enclosure 1

SAMPLE
PROVISIONAL PERMIT
TRANSMITTAL LETTER

Dear _____:

We have completed our review of your permit application identified as [File No., appl. name, etc.] for the following proposed work:

near/in/at_____.

Enclosed is a "PROVISIONAL PERMIT." The provisional permit is NOT VALID and does not authorize you to do your work. The provisional permit describes the work that will be authorized, and the General and Special Conditions [if any] which will be placed on your final Department of the Army (DA) permit, if the State of _____ Water Quality Certification and/or Coastal Zone Management (CZM) consistency requirements are satisfied as described below. No work is to be performed in the waterway or adjacent wetlands until you have received a validated copy of the DA permit.

By Federal law no DA permit can be issued until a State Section 401 Water Quality Certification has been issued or has been waived and/or the State has concurred with a permit applicant's CZM consistency determination or concurrence has been presumed. As of this date the [State 401 certification agency] has not issued a Section 401 Water Quality Certification for your proposed work. If the [State 401 certification agency] fails or refuses to act by [date 401 certification must be issued] the Section 401 Water Quality Certification requirement will be automatically waived. Also, as of this date the [State CZM agency] has not concurred with your CZM consistency determination. If the State does not act by [six months from receipt by the State of the applicant's CZM consistency determination] then concurrence with your CZM consistency determination will automatically be presumed.

Conditions of the State Section 401 Water Quality Certification and/or the State CZM concurrence will become conditions to the final DA permit. Should the State's action on the required certification or concurrence preclude validation of the provisional permit in its current form, a modification to the provisional permit will be evaluated and you will be notified as appropriate. Substantial changes

may require a new permit evaluation process, including issuing a new public notice.

Enclosure 2

FINAL PERMIT ACTIONS

Normal Permit Process

1. Corps completes permit decision, and state 401/CZM issued/waived
2. Corps sends unsigned permit to applicant
3. Applicant signs permit and returns with fee
4. Corps signs permit

Draft Permit Process

1. Corps completes permit decision, but state 401/CZM not complete
2. Corps sends draft permit to applicant
3. State 401/CZM issued waived
4. Applicant signs permit and returns with fee and 401/CZM action
5. Corps reviews 401/CZM action and signs permit

1. The signed draft permit with the attached 401/CZM action is to be treated as the applicant's request for a permit subject to any 401/CZM certification/concurrence including any conditions.

2. If the 401/CZM action results in a modification to the draft permit, then step 4. would be treated as a request for such modification and if we agree with the modification, then the permit would be issued with the modification and the decision document supplemented, as appropriate. If the Corps does not initially agree with the modification, or it involves a substantial change or measurable increase in adverse impacts, then the modification would be processed as a separate permit action for reporting purposes.

Once the State has issued the required Section 401 Water Quality Certification and/or concurred with your CZM consistency determination or the dates above have passed without the State acting, and you agree to the terms and conditions of the provisional permit, you should sign and date both copies and return them to us [along with your \$100.00/\$10.00 permit fee]. Your DA permit will not be valid until we have returned a copy to you bearing both your signature and the signature of the appropriate Corps official.

If the State denies the required Section 401 Water Quality certification and/or non-concurs with your CZM consistency determination, then the DA permit is denied without prejudice. If you should subsequently obtain a Section 401 Water Quality Certification and/or a CZM consistency determination concurrence, you should contact this office to determine how to proceed with your permit application.

If you have any questions concerning your State Section 401 Water Quality Certification, please contact (State 401 certification contact)

If you have any questions concerning your CZM consistency determination, please contact (State CZM contact)

If you have any other questions concerning your application for a DA permit, please contact [Corps contact] at [Corps contact telephone number]

Enclosure 3

PROVISIONAL PERMIT

NOT VALID

DO NOT BEGIN WORK

This PROVISIONAL PERMIT is NOT VALID until:

1) You obtain:

_____ a Section 401 Water Quality Certification from (State Agency).

_____ a Coastal Zone Consistency determination concurrence from (State Agency)

2) You sign and return the enclosed provisional permit with the State Section 401 Water Quality Certification and/or CZM concurrence and the appropriate permit fee as indicated below:

_____ \$10.00 _____ \$100.00 _____ No fee required

3) The Corps signs the permit and returns it to you.

Your permit is denied without prejudice, if the State denies your Section 401 Water Quality Certification and/or non-concurs with your Coastal Zone Management consistency determination.

DO NOT BEGIN WORK