Public Notice

US Army Corps of Engineers
Detroit District
Louisville District

Applicant: The Public

Date: October 4, 2007

In Reply Refer To: File No. LRE 1998-1000100

PROGRAMMATIC GENERAL PERMIT FOR ACTIVITIES IN PUBLIC FRESHWATER LAKES IN INDIANA

1. In accordance with Title 33 CFR Part 325 (c)(1), as published November 13, 1986 in the Federal Register, Volume 51, No. 219, the U.S. Army Corps of Engineer Districts, Detroit and Louisville (the Districts), have issued a Programmatic General Permit (PGP) for certain construction activities in waters of the United States within the State of Indiana under Section 404 of the Clean Water Act of 1977 that are also regulated by the Indiana Department of Natural Resources (IDNR) as public freshwater lakes under the Lake Preservation Act, IC 14-26-2.

2. The PGP affords the Districts with a means to authorize activities of a minor nature through an abbreviated review process that relies on existing permit review procedures by the IDNR, and reduces costs, delays, and paperwork at all levels of government. When performed under the limitations and conditions explained below, these activities will cause only a minimal adverse environmental impact when performed separately, and will have only a minimal adverse cumulative effect on the environment. These activities are similar in nature, as they will conform to the specific categories identified below, and to the attached glossary of terms.

EFFECTIVE DATE: December 3, 2007

DURATION: The PGP will be in effect for five (5) years, expiring on December 3, 2012. At that time, it will be re-evaluated for its effectiveness. The Districts reserve the right to suspend the PGP before the 5-year time period expires.

COVERAGE AREA: Public freshwater lakes regulated under IC 14-26-2, located in the following counties: Adams, Allen, Cass, DeKalb, Elkhart, Fulton, Huntington, Jasper, Kosciusko, LaGrange, Lake, LaPorte, Marshall, Miami, Newton, Noble, Porter, Pulaski, St. Joseph, Starke, Steuben, Wabash, Wells, White, Whitley. Water bodies or activities not regulated by the IDNR under IC-14-26-2 are not eligible for the PGP.

ACTIVITIES COVERED: The discharge of dredged or fill material into waters of the United States (regulated by the Corps of Engineers under Section 404 of the Clean Water Act).

PROCEDURES: The PGP authorization consists of two categories of activities. Eligibility, application, and review procedures described below for these categories are tied to the IDNR permit programs and procedures currently in place. Applicants proposing to discharge dredged and/or fill material into waters of the U.S., including wetlands subject to the Corps' Section 404

jurisdiction, must obtain the following State approvals in order for the general permit authorization to be valid. Applicants are responsible for ensuring that all required State and local approvals have been applied for and obtained.

1. A license from the IDNR under IC 14-26-2 for construction activities along and within Indiana's public freshwater lakes.

2. Water Quality Certification (WQC) from the Indiana Department of Environmental Management (IDEM) is required for work in Corps' jurisdiction involving a discharge to waters of the U.S. Some projects authorized under the PGP may require an individual Section 401 WQC issued by IDEM before work can proceed.

The Corps' involvement will vary based on Category of activity.

Category I Activities

1. Shore Protection:
   a. Activities no more than 250 feet in length, and an average of no more than 1 cubic yard per lineal foot of discharge waterward of the Ordinary High Water Mark (OHWM).
   b. Includes 1) the construction of new seawalls provided they are constructed of bioengineered material or glacial stone, and 2) the refacing of existing seawalls. Refacing does not include the conversion of a stone or bioengineered seawall into concrete.

2. Beach Construction: Areas which meet IDNR criteria under 312 IAC 11-4-4 for Public Freshwater Lakes. These criteria may be found on the internet at either of the following websites: http://www.in.gov/legislative/iac/T03120/A00110.pdf or http://www.in.gov/legislative/iac/title312.html.

3. Filling of Boat Wells: Existing boat wells no more than 20 feet wide and 30 feet long, provided that a bulkhead seawall is constructed prior to placement of fill within the boat well. Note: new concrete or sheet pile bulkhead seawalls built for this purpose are covered as Category I—Shore protection.

4. General License Activities: Work which meets IDNR criteria under 312 IAC 11-3-1 for temporary structures, dry hydrants, and glacial stone refaces. These criteria can be found in the internet at the websites listed above in item 2.

Category I Procedures: Work in Indiana subject to Corps' jurisdiction which meets all of the above terms and the PGP general conditions below may proceed without application or notification to the Corps provided that the required State authorization has been obtained. The State permit will include language confirming Federal authorization under the PGP, and the

Federal PGP conditions. If an applicant objects to any of the Federal PGP conditions, the application will be forwarded on to the Districts for processing as a Category II permit, or as a general or individual permit, as appropriate. Activities located in wetlands as defined by the Corps or IDNR designated Significant Wetlands (as defined under 312 IAC 11-2-24) are not eligible for Category I, with the exception of general license activities such as glacial stone refaces. IDNR, at its discretion, may elect to coordinate other projects in accordance with Category II.

Category II Activities

1. Shore protection:
   a. Activities greater than 250 feet in length, and/or greater than 1 cubic yard per lineal foot of discharge waterward of the OHWM. Seawalls greater than 500 feet in length are not eligible for the PGP.
   b. All new seawalls constructed of concrete or sheet piling with backfill, regardless of length or amount of discharge waterward of the OHWM. (Exception—bulkhead seawalls built in association with Category I boat well fill)

2. Beach Construction: Areas outside of those identified in Category I.

3. Any of the Category I activities located in wetlands (as defined by the Corps) or in IDNR identified Significant Wetlands as defined under 312 IAC 11-2-24. In this situation, a wetland delineation report, prepared in accordance with the Corps of Engineers Wetlands Delineation Manual (Y-87-1, dated January 1987), will be required by the Corps. Wetland fill (as defined in 33 CFR Part 323.2) that exceeds 0.1 acre (4,356 square feet) in area does not qualify for the PGP.

4. Activities where part of the work in Corps' jurisdiction did not require an IDNR permit (for example, work above the IDNR legal lake level or in adjacent wetlands).

5. Activities which may affect Federally listed endangered, threatened, or proposed species.

6. Activities which may impact historical, cultural, or archaeological resources or practices as provided in Section 106 the National Historic Preservation Act of 1966 and the Archaeological and Historic Preservation Act of 1974.

7. Activities authorized by order of the Indiana Natural Resources Commission following appeal of an IDNR permit denial.

8. Any other action elevated to Category II.

Category II Procedures: Work in Indiana subject to Corps' jurisdiction which meets all of the above terms and the PGP general conditions below may be considered for the PGP through the following procedure. Upon receipt of a complete application or issuance of a permit, IDNR will forward a copy to the Corps indicating that it appears to meet Category II. The IDNR will also inform the applicant that their application has been referred to the Corps for evaluation as a Category II activity under the PGP. Any IDNR permit will indicate that a separate permit from the Corps is required. The Corps will determine if the Category II applications are complete (using the IDNR permit application, Indiana State Form 42946), and evaluate each application to determine whether it meets the minimal impact standard, the PGP general conditions, and the intent of the PGP. The Corps may either: 1) authorize the project under the PGP, with any special conditions or modifications necessary to reduce the impacts to no more than minimal, or 2) determine that the PGP is not appropriate. A project that does not qualify for the PGP may be considered under any of the Corps' other evaluation methods, including Regional, Nationwide, and individual permits. The Corps will respond to Category II applications in writing.

Discretionary Authority: For either Category I or II activities, the District may, at its discretion or at the request of the IDNR, determine that the PGP is not appropriate and require an individual permit review. If this occurs after the IDNR permit has been issued, the Corps will inform the applicant in writing that the Federal authorization for work has been suspended and additional review is required.

Project-Specific PGP Conditions: The District may add project-specific conditions to PGP authorizations. PGP authorization in Category II will be confirmed by the District sending the project proponent a verification letter that specified any required conditions.

State Water Quality and Coastal Zone Certification: A State Section 401 Water Quality Certification (WQC) or waiver is required for this PGP, or for individual projects under the PGP. In Indiana, this authority resides with the Department of Environmental Management (IDEM) and the IDNR. This Public Notice constitutes the application for the 401 certification. IDEM will review the PGP for compliance with the applicable provisions of Sections 301, 302, 303, 306 and 307 of the Clean Water Act (CWA), including the state water quality standards currently set forth at 327 IAC 2. They will consider comments regarding this proposal postmarked within 30 days of this notice. Comments to IDEM should be addressed to IDEM, Office of Water Quality, 100 N. Senate Ave., MC65-42 WQC 1255, Indianapolis, Indiana 46206-6015. Once their review is complete, IDEM has the following options regarding their 401 Water Quality Certification: waive, deny, grant, or grant with conditions.

The PGP complies with Indiana's approved coastal management program, the Lake Michigan Coastal Program (LMCP), and will be conducted in a manner consistent with the program.

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Further Information: Questions on this matter may be directed to Kerrie Kuhne at the Detroit District Corps of Engineers, telephone 313-226-5381, or to Tim Smith at the Louisville District, Corps of Engineers, telephone 317-532-4227.

FOR THE DISTRICT ENGINEER:

JOHN KONIK
Chief, Regulatory Office
Engineering & Technical Services Division
Detroit District

for JAMES M. TOWNSEND
Chief, Regulatory Branch
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Louisville District

NOTICE TO POSTMASTERS:

We request that the above notice by conspicuously and continuously posted for 30 days from the date of issuance of this notice.

PGP GENERAL CONDITIONS

The following general conditions must be followed in order for any PGP authorization to be valid:

GENERAL REQUIREMENTS

1. *Other Permits:* Authorization under this general permit does not obviate the need to obtain other Federal, State, or local authorization required by law.

2. The Corps of Engineers retains authority on a case-by-case basis, to require review for an individual permit based on concerns for the aquatic environment or for any other factor of the public interest. This authority may be invoked where there is a particular resource or concern associated with a project, or where potential cumulative environmental impacts warrant additional review.

3. *Jurisdiction:* PGP permits issued by the IDNR include an implicit preliminary jurisdictional determination by the U.S. Army Corps of Engineers that the proposed work will impact waters within Corps' jurisdiction. Commencement of work verified under the PGP is considered acceptance of Federal jurisdiction. Applicants wishing to appeal this determination must notify the Corps and request an approved jurisdictional determination, and await a response before they start work.

4. *Property Rights:* Authorization under this general permit does not grant any property rights, exclusive privileges, or authorize any injury to the property or rights of others.

5. *Proper maintenance:* Any structure or fill authorized shall be properly maintained, including maintenance to ensure public safety.

6. *Case-by-case conditions:* The activity must comply with any case specific conditions added by the Corps or by the State in its section 401 water quality certification.

7. *Federal Liability:* The Federal Government does not assume any liability for the following: a) damages to the permitted project or uses thereof as a result of other permitted or unpermitted activities or from natural causes; b) damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest; c) damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit; d) design or construction deficiencies associated with the permitted work; e) damage claims associated with any future modifications suspension, or revocation of this permit.

NATIONAL CONCERNS

8. *Navigation:* No activity may cause more than a minimal adverse effect on navigation.

9. *Endangered Species:*

(a) No activity is authorized under any PGP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act, or which is likely to destroy or adversely modify the critical habitat of such species. No activity is authorized under the PGP which "may affect" a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed.

(b) Non-federal permittees shall notify the District Engineer if any listed species or critical habitat might be affected or is in the vicinity of the project, and shall not begin work on the activity until notified by the District Engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species or designated critical habitat, PGP applicants will have to provide the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. The District Engineer will determine whether the proposed activity "may affect" or will have "no effect" to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps' determination. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the project, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification the proposed activities will have "no effect" on listed species or critical habitat, or until Section 7 consultation has been completed.

(c) As a result of formal or informal consultation with the FWS, the District Engineer may add species-specific endangered species conditions to any PGP verification.

(d) Authorization of an activity by a PGP does not authorize the "take" of a threatened or endangered species as defined under the Federal Endangered Species Act. In the absence of separate authorization (*e.g.*, an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the U.S. Fish and Wildlife Service, both lethal and non-lethal "takes" of protected species are in violation of the Endangered Species Act. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. Fish and Wildlife Service or at their website: http://www.fws.gov/midwest/endangered/lists/indiana-spp.html.

10. *Historic properties:*

(a) In cases where the District Engineer determines that the activity may affect properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Non-federal permittees must submit a notification to the District Engineer if the authorized activity may have the potential to cause effects to any historic properties listed, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historical Places, including previously unidentified properties. For such activities, the notification must state which historic properties may be affected by the proposed work or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of or potential for the presence of historic resources can be sought from the State Historic Preservation Officer or Tribal Historic Preservation Officer (SHPO/THPO), as appropriate, and the National Register of Historic Places (see CFR 330.4(g)). The District Engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted and these efforts, the District Engineer shall determine whether the proposed activity has the potential to cause an effect on the historic properties. Where the non-Federal applicant has identified historic properties which the activity may have the potential to cause effects and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the District Engineer either that the activity has no potential to cause effects or that consultation under Section 106 of the NHPA has been completed.

(c) The District Engineer will notify the prospective permittee whether NHPA Section 106 consultation is required. Section 106 consultation is not required when the Corps determines that the activity does not have the potential to cause effects on properties (see 36 CFR 800.3(a)). If NHPA Section 106 consultation is required and will occur, the District Engineer will notify the non-Federal applicant that he or she cannot begin work until Section 106 consultation is completed.

11. *Tribal rights:* No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

MINIMIZATION OF ENVIRONMENTAL IMPACTS:

12. *Soil erosion and sediment controls:* The permittee shall install sedimentation and soil erosion control measures prior to any construction activity, and maintain them in effective operating condition during construction. This shall include the installation of straw bale barriers, silt fencing and/or other approved methods to control sedimentation and erosion. The permittee shall immediately stabilize areas disturbed by any construction activity, including channel banks, and revegetate with a combination of grasses, legumes, and shrubs compatible to the affected area.

13. *Equipment:* All construction equipment shall be refueled and maintained on an upland site away from existing streams, drainageways, and wetland areas. Heavy equipment working in wetlands must be placed on mats, or other measures must be taken to minimize soil disturbance.

14. *Suitable material:* No activity, including structures and work in waters of the United States or discharges of dredged or fill material, may consist of unsuitable material (*e.g.*, trash, debris, car bodies, asphalt, slag, etc.). Material used for construction or discharge must also be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act).

15. *Water Quality:* Some PGP authorizations may not be valid unless a case-specific Section 401 Water Quality Certification is obtained from or considered waived by the IDEM and/or IDNR. Where the State (either generically or individually) does not require/approve a water quality management plan, the permittee must include design criteria and techniques that provide for protection of aquatic resources. The permittee must comply with all project conditions associated with general or case-specific Water Quality Certifications.

16. *Water Supply Intakes:* The permittee shall not perform any work under the PGP where the discharge of dredged material and/or fill material would occur in the proximity of a public water supply intake except where the activity is for the repair of the public water supply structure or adjacent bank stabilization.

17. *Minimization/Avoidance:* Discharges of dredged or fill material into waters of the United States must be minimized or avoided to the maximum extent practicable at the project site (i.e., on-site). In determining the minimal impact threshold, the Districts will consider the direct and secondary impacts of the fill or work and any mitigation measures.

18. *Mitigation:* The permittee shall provide a mitigation/monitoring plan for any activity where the adverse impact on special aquatic sites is determined to be more than minimal impact. If mitigation is required, the permittee shall develop the mitigation site concurrently with site construction.

19. *Waterfowl breeding areas:* Activities, including structures and work in navigable waters of the United States or discharges of dredged or fill material, into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.

20. *Removal of temporary fills:* Any temporary fills must be removed in their entirety and the affected areas returned to their preexisting elevation.

21. *Access:* Representative from the Corps of Engineers may inspect any authorized activity or mitigation site at any time deemed necessary to ensure compliance with the terms and conditions of the PGP.

GLOSSARY

Bioengineered*: The use of a combination of biological elements (plant materials) and structural or mechanical reinforcements for stabilization, revetment, or erosion control. Biological and mechanical elements must function together in an integrated and complementary manner.

Boat well*: A manmade excavation along the shoreline or waterline of a public freshwater lake that 1) is used for the mooring of a boat and 2) has been stabilized to prevent erosion.

Bulkhead seawall*: A vertical or near-vertical, solid concrete, steel sheetpile or vinyl piling structure which has the purpose of shoreline protection.

Currently serviceable: Currently serviceable means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.

Glacial stone*: A rounded stone that satisfies the following 1) was produced by glacial activity, 2) no individual stone weighs more than 120 pounds, 3) at least 90% of the material passes through a 12-inch sieve, and 4) no more than 10% passes through a 6-inch sieve.

Ordinary High Water Mark (OHWM): The line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

Programmatic General Permit (PGP): A type of general permit founded on an existing state, local, or other Federal agency program and designed to avoid duplication with that program.

Public freshwater lake*: A lake that has been used by the public with the acquiescence of a riparian owner. Does not include Lake Michigan, any lakes lying wholly or in part within the city of East Chicago, Gary, or Hammond, or any privately owned bodies of water used for the purpose of or created as a result of surface coal mining.

Seawall*: a manmade structure placed along the shoreline or water line of a public freshwater lake for the purpose of shoreline stabilization.

Seawall reface*: Reinforcing of an existing seawall along the lakeward face.

Significant wetland*: A transitional area between terrestrial and deep-water habitats containing at least one of the following: 1) At least 2,500 square feet of contiguous, emergent vegetation or rooted vegetation with floating leaves landward or lakeward of the shoreline or water line. The areal extent is independent of ownership, 2) Adjacent wetland areas designated by a federal or

state agency under one of the following—the National Wetland Inventory, the US Army Corps of Engineers Wetlands Delineation Manual (1987), or the National Food Security Act Manual (1994), and 3) The existence of a species listed at 15 IR 1312 in the Roster of Indiana Animals and Plants that are Extirpated, Endangered, Threatened, or Rare.

Underwater beach*: An area of lakebed that is 1) lakeward of the shoreline or waterline of a public freshwater lake and 2) used for a recreational purpose, such as wading or swimming.

Wetlands: Those areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. The Corps uses the methods and guidelines found in its 1987 Wetland Delineation Manual to identify and delineate these wetlands.

* Definition taken from 312 IAC Article 11—Lake Construction Activities, Rule 2—Definitions, found at http://www.in.gov/legislative/iac/title312.html