



Public Notice

**US Army Corps
of Engineers**

Louisville, Nashville,
Memphis and Huntington
Districts ®

Public Notice No.
LRL-2010-323

Date: September 11, 2020 Closing Date: N/A

Please address all comments and inquiries to:

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NOTICE ANNOUNCING A MINOR MODIFICATION TO THE LETTER OF PERMISSION AUTHORIZING NEW MITIGATION PROJECTS ASSOCIATED WITH APPROVED COMPENSATORY MITIGATION BANKING AND IN-LIEU FEE INSTRUMENTS

The Louisville, Huntington, Memphis and Nashville Districts of the U.S. Army Corps of Engineers (the Districts) announce a minor modification of the previously issued Letter of Permission Authorizing New Mitigation Projects Associated with Approved Compensatory Mitigation Banking and In-Lieu Fee Instruments (Mitigation LOP). The Mitigation LOP was issued on September 27, 2011 in accordance with Title 33 CFR 325.5 (b) (2), published in the Federal Register, Volume 51, No. 219, pursuant to Section 10 of the Rivers and Harbors Act of 1899 (“Section 10”) and Section 404 (“Section 404”) of the Clean Water Act (CWA). The Mitigation LOP streamlined the approval process, provided additional agency coordination and made the approval of compensatory mitigation projects consistent with the April 10, 2008 “Compensatory Mitigation for Losses of Aquatic Resources” (“Mitigation Rule”) (CFR Vol. 73 No. 70, p 19670-19705 (33 U.S.C. 401 *et seq.*; 33 U.S.C. 1344; and Pub. L. 108-136). This notice announces a minor modification of the Mitigation LOP to: 1) provide consistency with the “Clean Water Act Section 401 Certification Rule”, published in the Federal Register (85 Fed. Reg. 42,210) on July 13, 2020, 2) clarify the role of the Districts in coordinating Section 7 of the Endangered Species Act and Section 106 of the National Historic Preservation Act, 3) cite RGL 16-01, 4) clarify that the Districts may extend the Early Agency Comment Period to facilitate resolution of agency issues, 5) add an optional Preliminary Design/JD and Assessment Verification Meeting to the Implementation Procedures, 6) provide consistency with the Districts’ electronic business practices for agency coordination and submittal of permit applications, 7) clarify the elements to be submitted with a DA application, 8) define when projects with adverse effects under Section 106 could be authorized by these procedures, and 9) non-substantive revisions to eliminate redundant or unclear text. These changes are incorporated into the attached Mitigation LOP and Mitigation LOP process diagram (“LOP Implementation Procedures”).

DESCRIPTION OF MODIFICATION:

Clean Water Act Section 401 Certification Rule. Mitigation LOP “Restrictions,” Implementation Procedure No. 2, and Application Procedure No. 8, require that the applicant obtain a Clean Water Act (CWA) Section 401 individual Water Quality Certification, Water Quality Certification-LOP, general certification or waiver, if required by the Kentucky Division of Water. Revisions to these sections ensure consistency with the WQC Section 401 Certification Rule, published in the Federal Register (85 Fed. Reg. 42,210) on July 13, 2020. General Condition Nos. 7 and 17 have been updated to ensure compliance with the Clean Water Act Section 401 Certification Rule.

Clarification of coordination procedures under Section 7 of the Endangered Species Act and Section 106 of the National Historic Preservation Act. Implementation Procedure No. 1 (a) was revised to clarify that the appropriate Corps District is responsible for coordination/consultation under these two federal laws.

Jurisdictional determinations. Mitigation LOP Implementation Procedure No. 2(b) and Application Procedure No. 5 were revised to reference RGL 16-01.

Extension of the Early Agency Comment Period. Implementation Procedure No. 1 (c) was revised to accommodate an extension by the Corps of the 15-day early comment period to facilitate resolution of critical, substantive, agency comments/issues.

Preliminary Design/JD and Assessment Verification Meetings. Implementation Procedure, No. 1 (d) was added to accommodate review of the preliminary design and field verification of the jurisdictional status of the on-site aquatic resources. For projects that include assessment of quality or type of aquatic resource, this meeting includes verification of the data associated with the assessment.

Electronic submittal. The Agency Coordination, Implementation and Coordination Procedures have been revised to include the requirement for electronic submittal of all information necessary to process applications under the terms and conditions of the Mitigation LOP.

Elements to be submitted with a DA application. Implementation Procedure No. 2 has been streamlined to eliminate redundancy with text found under the description of a complete application in the Application Procedures section of the LOP. The Application Procedures were revised to clarify what information should be submitted with the DA application. Item 9, requiring submittal of a surrounding property owner list and public notice figure(s), was added to the Application Procedures.

Exclusions. Exclusion No. 3 was clarified to indicate that projects causing adverse effects and without a signed memorandum of agreement would likely be excluded from these procedures.

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All other terms and conditions of the Mitigation LOP remain in effect. A copy of the modified Mitigation LOP is included below.

Please be advised that the Corps is not seeking public comment on this notice. Any questions should be directed to Patricia A. Grace-Jarrett, Ph.D. at the address noted above and should refer to the Public Notice Number LRL-2010-323.

LETTER OF PERMISSION FOR NEW MITIGATION PROJECTS ASSOCIATED WITH
APPROVED COMPENSATORY MITIGATION BANKING AND IN-LIEU FEE
INSTRUMENTS

COVERAGE AREA:

All “waters of the United States” (U.S.) in the Commonwealth of Kentucky.

CATEGORIES OF ACTIVITY COVERED BY THE LOP:

The LOP authorizes work in navigable waters and discharges of dredged or fill material into “waters of the U.S.”. The LOP authorizes all activities performed in association with the enhancement, rehabilitation, establishment, re-establishment, maintenance, and repair of compensatory mitigation projects associated with a Corps approved Mitigation Bank (Bank) or In-Lieu Fee (ILF) Instrument, including dredging, temporary and permanent work, structures, discharges of dredged or fill material into “waters of the U.S.,” the removal of structures, and the removal of fill.

LIMITATIONS:

Compensatory mitigation projects must result in a net increase in aquatic resource functions and services.

MITIGATION:

Projects approved by the LOP provide compensatory mitigation associated with an approved Bank or ILF Instrument and result in a net increase in aquatic resource functions and services; hence, no additional mitigation is required.

RESTRICTIONS:

The work authorized by the LOP is subject to the attached General Conditions and any project-specific Special Conditions necessary to satisfy legal requirements or to otherwise satisfy the public interest requirements, to provide assurances that the project is consistent with the

Mitigation Rule, and to ensure compliance with the approved Bank or ILF Instrument.

Detailed project Concept and Mitigation Plans, consistent with the Mitigation Rule and any available District Guidance or Standard Operating Procedures (SOPs), are required for project approval under the LOP.

The LOP could not be issued if any legally required Federal, State, or local authorization or certification is denied. The LOP, if otherwise warranted, will not be issued until a Water Quality Certification (WQC), WQC-LOP, or waiver, consistent with the “Clean Water Act Section 401 Certification Rule”, published in the Federal Register (85 Fed. Reg. 42,210) on July 13, 2020, is on file with the Corps. The Corps may, at their discretion, determine that the LOP is not appropriate for a given proposal and require a Standard Individual Permit review of the proposal.

IMPLEMENTATION PROCEDURES:

The U.S. Fish & Wildlife Service (USFWS) and the U.S. Environmental Protection Agency (USEPA) retain the option to refer individual projects proposed for authorization under the LOP through the procedures outlined in the 1992 Memorandum of Agreement Part IV, Elevation of Individual Permits, paragraph 3(a) and 3(b), regarding Section 404(q) of the CWA, when the discharge will result in a substantial and unacceptable adverse effect to aquatic resources of national importance.

Implementation procedures for the LOP are depicted in the attached process diagram (LOP Implementation Procedures) and described below.

All submittals associated with the implementation procedures will be consistent with the Districts’ electronic submittal procedures. These can be found on each District’s web site under “Obtain a Permit”.

1. Early Coordination:

(a) The Mitigation Bank or ILF Sponsor will initiate Early Coordination of the compensatory mitigation projects with the applicable Corps District and the Interagency Review Team (IRT). The IRT consists of representatives of the USEPA, the USFWS, the Kentucky Department of Fish and Wildlife Resources (KDFWR), the Kentucky Division of Water (KDOW), and is chaired by the Corps.

Early Coordination will facilitate early screening of compensatory mitigation projects for State critical resources and water quality standards, Federally-listed threatened or endangered species or their critical habitats and for properties that may be listed or eligible for listing on the National Register of Historic Places (NRHP). This early coordination will ensure compliance with the Section 404(b) (1) Guidelines, Section 106 of the National Historic Preservation Act (NHPA), 33

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CFR Part 325, Appendix C, Section 7 of the Endangered Species Act (ESA) and Mitigation LOP General Conditions 4, 7, and 11. To ensure compliance with Section 106 of the NHPA and with Section 7 of the ESA, the Corps will initiate consultation with the Kentucky State Historic Preservation Officer (KYSHPO) and with the USFWS during the Early Coordination Period.

Projects to be implemented on State lands must be compliant with State antiquities laws. To ensure compliance with these laws, the applicant must initiate coordination with the KYSHPO prior to the pre-application site visit.

(b) Pre-Application Site Visit: The Sponsor will contact the District and the IRT to schedule a Pre-Application Site Visit. At the Corps' discretion, other coordinating State and Federal agencies may be included. A minimum of 30 days prior to the date of the Pre-Application Visit, the Sponsor will distribute a Concept Plan, consistent with the Mitigation Rule and any available District Guidance/Standard Operating Procedures (SOPs), a jurisdictional determination (JD) request and a draft JD (consistent with RGL 16-01), to the District, the IRT and other appropriate coordinating agencies. The pre-application site visit will occur within 60 days from receipt of the Concept Plan unless the Corps determines otherwise.

(c) Early Agency Comment Period: The Corps will accept written comments from the IRT, in electronic format for a period of 15 days from the date of the Pre-Application Site Visit, unless this time period is extended, in writing, by the Corps. The early agency comment period may be extended for the purpose of resolving critical, substantive issues raised by the IRT in response to the Concept Plan and/or the information obtained during the Pre-application site visit. Copies of comments which are received during the Early Agency Comment Period will be forwarded by the Corps to the Sponsor for consideration.

(d) Preliminary Design/JD and Assessment Verification Meetings. Based on information contained in the Concept Plan and comments received during the early agency comment period, the Corps may request a preliminary design/JD and aquatic assessment verification meeting. This two part meeting will include a presentation to the IRT, explaining the design concept, and provide an opportunity for questions and comments from IRT members. A site visit to verify the JD and the aquatic assessment scores may be conducted following the presentation. The Corps will accept written comments from the IRT, in electronic format, for a period of 15 days from the date of the Preliminary Design/JD and Assessment Verification Meetings. The Corps may extend the 15 day comment period, at its discretion, in the event that the extension will facilitate timely review of the Section 404 DA application.

2. Complete LOP/Section 404 DA Application: The Sponsor will submit a complete DA application, in electronic format, for compensatory mitigation projects to be considered under the LOP. Applicants should follow the most recent Corps "Complete Application Checklist" to assist with submittal. The Complete LOP Application shall be submitted concurrently to the Corps and the IRT.

The Corps shall review the Complete Application for compliance with the terms, limitations, and General Conditions of the LOP. Any project that does not comply would not be authorized by this LOP. The Corps will notify the Sponsor and IRT through email following receipt of the Complete LOP Application as to whether the LOP would be applicable. The Corps could, at their discretion, determine that the LOP is not appropriate and require a Standard Individual Permit review of the proposal.

3. IRT Consultation and Public Notice: Upon determination that the application may be evaluated under the terms and conditions of the LOP and that the application is complete, the Corps shall notify the public and the IRT. The IRT consultation shall run concurrently with the public consultation and extend for a period of 30 days. The Corps shall accept written comments, submitted electronically, during this period.

4. Notification of Intent to Approve a Project and Dispute Resolution: The Corps shall notify the IRT (via email) of its intent to approve the project, which is considered a modification to the approved Instrument. Dispute resolution shall follow the process outlined in the Mitigation Rule at 332.8(e).

APPLICATION PROCEDURES:

Applicants proposing to conduct work under the LOP will submit a complete application to the appropriate District. All submittals will be consistent with the Districts' electronic submittal procedures. These can be found on each District's web site under "Obtain a Permit".

Applicants must receive written notification that the proposed work is authorized by the LOP prior to the commencement of work in "waters of the U.S."

A complete application includes the electronic submittal of the standard DA permit application form ENG 4345, any items deemed necessary by the Corps, and the information listed in 1 through 9 below:

1. Name, address, and phone number of the applicant.
2. Location of the proposed work to include latitude and longitude (in decimal degrees) or UTM, named stream(s) (if appropriate), watershed, river basin and service area (if appropriate).
3. Brief description, purpose, dimensions including the size (linear distance and acreage) of the structure or fill area, fill quantity, type of fill being used and any loss of "waters of the U.S."
4. For any project that include jurisdictional wetlands, a wetland delineation is required and must conform to the Corps of Engineers' Wetland Delineation Manual, Technical Report Y-87-1, and regional wetland manual supplement. Wetland functional or conditional assessments, if

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appropriate, must also be included. For any sites including streams, documentation of stream flow classification and stream quality, condition, or function is required.

5. A jurisdictional determination (JD), consistent with RGL 16-01, and current “ORM AR & Consolidated Upload Templates with Validation”.
6. A complete Project Mitigation Plan, consistent with the Mitigation Rule [(33 CFR 332.8 (j))] and any available District Guidance/SOPs. The complete Project Mitigation Plan must also include:
 - a. Design drawings (plan and cross-sections) and stream geomorphological data, if appropriate. Design drawings must include existing and proposed stream alignment(s).
 - b. Site protection instrument.
 - c. Credit release schedule, if different from the approved Instrument.
 - d. Other items as determined by the District.
7. Copies of any letters from the USFWS (see General Condition 11) and the KYSHPO documenting coordination and compliance with Section 7 of the ESA and Section 106 of the NHPA. Copies of studies, reports, or other documentation must be included.
8. An Individual WQC, WQC-LOP, or waiver issued by the KDOW, consistent with the “Clean Water Act Section 401 Certification Rule”, published in the Federal Register (85 Fed. Reg. 42,210) on July 13, 2020.
9. A list of adjoining property owners and figure(s) appropriate for inclusion in the public notice.

Applicants are encouraged to use the current “Complete Application Checklist” to facilitate submittal of the 404 application. This document may be obtained by request from the appropriate District.

EXCLUDED ACTIVITIES:

1. Activities that are denied required local, State or Federal authorization.
2. Activities that the District determines to have the potential to cause unacceptable adverse impacts on aquatic resources or to other public interest factors, are controversial, or which do not result in a net aquatic resource benefit. As discussed above, the District may, on a case-by-case basis, require a Standard Individual DA permit.
3. Projects which would result in adverse effects to National Register of Historic Places (NRHP)-eligible or –listed properties and without a signed Memorandum of Agreement (MOA)

to address such effects, would not generally be approved by this LOP. Such projects would typically be processed under the terms and conditions of an Individual DA Permit

GENERAL CONDITIONS:

1. Discharges of dredged or fill material into “waters of the U.S.” 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 Corps will consider the direct, secondary, and cumulative impacts of the fill or work and any mitigation measures.
2. The permittee shall ensure that sedimentation and soil erosion control measures are in place prior to any construction activity and that such measures are maintained throughout project construction. This shall include the installation of straw bale barriers, silt fencing, and/or other approved methods to control sedimentation and erosion. Sedimentation and erosion controls will not be placed in “waters of the U.S.,” except if specifically approved by the District.
3. The permittee shall ensure that areas disturbed by any construction activity, including channel banks, are immediately stabilized and revegetated with a combination of non-invasive grasses, legumes and shrubs compatible to the affected area and that will not compete with native vegetation.
4. The permittee shall ensure that all in-stream construction activity is not performed during periods of high stream flow or during the fish spawning season between April 1 through June 30 without first contacting and receiving the recommendations of the KDFWR for their expertise on impacts to the fishery resource. Additionally, the discharge of dredged and/or fill material in known waterfowl breeding and wintering areas must be avoided to the maximum extent practicable.
5. The permittee will ensure that the activity authorized will not disrupt movement of those aquatic species indigenous to the waterbody, including those species which normally migrate through the area unless the activity's specific purpose is to impound water.
6. The permittee shall ensure that all construction equipment is 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.
7. The permittee must comply with any case specific special conditions added by the Corps, including those associated with the issued WQC.
8. The permittee shall ensure that no activity authorized by the LOP may cause more than a minimal adverse effect on navigation.
9. The permittee shall ensure proper maintenance of any structure or fill authorized by this LOP, including maintenance to ensure public safety.

10. The permittee shall not perform any work within any Wild and Scenic Rivers or in any river officially designated as a "study river" for possible inclusion in the system, unless the appropriate Federal agency, with direct management responsibility for such river, has determined in writing that the proposed activity authorized by the LOP will not adversely affect the Wild and Scenic River designation or study status. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal Land Management agency in the area (e.g. U.S. Forest Service, Bureau of Land Management, the National Parks Service, or the U.S. Fish and Wildlife Service).

11. The permittee shall not perform any work under the LOP 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 (ESA), or which is likely to destroy or adversely modify the critical habitat of such species. The permittee 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 under the LOP until notified by the District Engineer that the requirements of the ESA have been satisfied and that the activity is authorized. Authorization of an activity under the LOP does not authorize the "take" of a threatened or endangered species as defined under the Federal ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the USFWS or the National Marine Fisheries Service, both lethal and non-lethal "takes" of protected species are in violation of the ESA.

Obligations under Section 7 of the ESA, must be reconsidered by the Corps if (1) new information reveals impacts of the proposed action may affect listed species or critical habitat in a manner not previously considered; (2) the proposed action is subsequently modified to include activities which were not considered during consultation; or (3) new species are listed or critical habitat designated that might be affected by the proposed action.

12. If the permittee discovers any previously unknown historic or archaeological remains while accomplishing the activity authorized by the LOP, work must be immediately stopped and this office immediately notified. The District will initiate the Federal, tribal and State coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

13. The permittee shall not perform any work under the LOP where the discharge of dredged and/or fill material would occur in the proximity of a public water supply intake.

14. No activity, including structures and work in "waters of the U.S." or discharges of dredged or fill material may consist of unsuitable materials (e.g. trash, debris, car bodies, asphalt, etc.) and that materials used for construction or discharge must be free from toxic pollutants in toxic amounts.

15. The permittee shall, to the maximum extent practicable, design the project to maintain pre-construction downstream flow conditions. Furthermore, the work must not permanently restrict or impede the passage of normal or expected high flows and that the structure or discharge of fill

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must withstand expected high flows. The project must provide, to the maximum extent practicable, for retaining excess flows from the site and for establishing flow rates from the site similar to pre-construction conditions.

16. The permittee shall ensure that all temporary fills, authorized under the LOP, be removed in their entirety and the affected areas returned to pre-construction elevations.

17. Representatives from the Corps and/or Kentucky Division of Water may inspect any authorized activity or mitigation site at any time deemed necessary to ensure compliance with the terms and conditions of the LOP, the Clean Water Act Section 401 Certification Rule, and applicable laws.

18. All work authorized by this LOP must be completed within 3 years after the date of the Corps' authorization letter, unless otherwise authorized by the Corps. If you find you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least three months before the expiration date.

19. The permittee, after completion of work under the LOP, shall submit a signed certification letter regarding the completed work and required mitigation, if applicable. The certification letter will include a statement that the work was done in accordance with the LOP authorization including compliance with all general and special conditions and completion of mitigation work.

LOP Implementation Process

