



**US Army Corps
of Engineers**

Louisville, Huntington,
Memphis, Nashville
Districts ®

Public Notice

Public Notice No.

LRL-2006-259-pgj

Date:

28 Oct 10

Closing Date:

N/A

Please address all comments and inquiries to:

U.S. Army Corps of Engineers, Louisville District

ATTN: Patricia Grace-Jarrett, Ph.D., CELRL-OP-FS, Rm 752

P.O. Box 59

Louisville, Kentucky 40201-0059

Phone: 502-315-6687

NOTICE ANNOUNCING MINOR MODIFICATIONS TO THE LETTER OF PERMISSION
AUTHORIZING TRANSPORTATION PROJECTS

The Louisville, Huntington, Memphis and Nashville Districts of the U.S. Army Corps of Engineers (the Districts) announce a minor modification to the previously issued Letter of Permission for Transportation Projects ("Transportation LOP"). The original Transportation LOP was issued on October 3, 2007, 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 and Section 404 of the Clean Water Act (CWA). It supported the initiative directed by Section 1309 of the Transportation Equity Act for the 21st Century (TEA-21) to streamline the review process for transportation projects. This modification is based on comments received from state and federal agencies during the first periodic review ("Implementation Procedures", No. 5), and to update the Transportation LOP to be consistent with the 2008 "Compensatory Mitigation for Losses of Aquatic Resources" ("Mitigation Rule") in the Federal Register (FR) (FR Vol. 73 No. 70, p 19670-19705 (33 U.S.C. 401 *et seq.*; 33 U.S.C. 1344; and Pub. L. 108-136), interim regional supplements to the Corps' wetland delineation manual and recent Regulatory Guidance Letters (RGLs).

In general, changes include clarification or the addition of language or citations for the following items:

- Project description to include the appropriate units;
- Application to include a draft jurisdictional determination (RGL 08-02);
- Wetlands delineation reports to follow the procedures specified in the Corps of Engineers 1987 wetland delineation manual and the interim regional supplements;
- Application to include a mitigation proposal for projects requiring mitigation (Mitigation Rule);

- Permittee-responsible mitigation must be consistent with the Mitigation Rule and RGL 08-03;
- Application to include a summary of avoidance and minimization measures;
- Clarification that coordination letter(s) from KDOW include Individual Water Quality Certification, Water Quality Certification-LOP, general certification or waiver;
- Noting that other information, as determined by the Corps, may be required; and
- Other minor re-wording to eliminate redundant or unclear text.

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., CELRL-OP-FS, at the address noted above and should refer to the Public Notice Number LRL-2006-259.

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 all activities performed on any public road by state and local governments and/or their agents. These activities include temporary and permanent work, structures, and discharges of dredged or fill material commonly associated with linear transportation projects that impact "waters of the U.S." Some examples include:

1. New roadway alignments;
2. Roadway realignments;
3. Installation of additional traffic lanes to existing roadways;
4. Construction of roadway embankments and bridge abutments;
5. Upgrading and/or maintenance of bridges and other stream-crossing facilities;
6. Construction of staging areas, borrow and disposal sites;
7. Stream bank stabilization;
8. Stream relocation;
9. Dredging, debris removal and excavation associated with the above activities;

Operations Division
Regulatory Branch (South)
I.D. No. LRL-2006-259

10. General maintenance activities associated with linear transportation facilities; and

11. Project-specific mitigation activities.

MAXIMUM LIMITATIONS:

Impacts to waters of the United States are limited to seven acres of "waters of the U.S.", including wetlands, for a project rather than an individual crossing.

MITIGATION:

Impacts resulting from the discharge of fill or dredged material into "waters of the U.S." of greater than 300 linear feet of intermittent or perennial stream; the filling of greater than 0.10 acre of "waters of the U.S."; or work causing more than minimal effects will require mitigation to compensate for impacts to the "waters of the U.S." Other work or structures in navigable waters will be evaluated and must include mitigation to reduce the impacts to minimal levels.

RESTRICTIONS:

The work authorized by this LOP is also subject to the attached General Conditions, which are necessary to reduce impacts to a minimum level.

IMPLEMENTATION PROCEDURES:

1. Applicant Coordination:
 - a. Prior to submitting the application, the applicant will coordinate projects being considered for authorization by the LOP with the applicable District, the United States Environmental Protection Agency (USEPA), the Kentucky Department of Fish and Wildlife Resources (KDFWR), the Kentucky Division of Water (KDOW), the U.S. Fish and Wildlife Service (USFWS) in accordance with the Endangered Species Act, and the Kentucky State Historic Preservation Officer (KYSHPO) in accordance with the National Historic Preservation Act. This will allow the early screening of proposed alignments 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 and General Conditions 5, 8, 12 and 13. This coordination will be accomplished by prearranged meetings hosted by the Districts and applicants, such as the Kentucky Transportation Cabinet.

- b. The applicant will conduct early coordination with USFWS and KYSHPO to determine if the proposed action will affect listed species or critical habitat or affect any historic property that is listed, determined to be eligible, or which the applicant has reason to believe may be eligible for listing on the NRHP. Through this early coordination, if adverse effects may occur to listed species or NRHP-eligible or -listed properties, the applicant will contact the Corps so federal consultation may be initiated. Copies of early coordination letters shall be provided to the Corps.
2. The Districts will review complete applications for project compliance with the terms, maximum limitations, and General Conditions. Any project that does not comply could not be authorized by this LOP.
3. The Districts will respond by email to all complete applications within 45 days as to whether the LOP will be applicable or an Individual Permit will be required.
4. The Districts may, at their discretion, determine that the LOP is not appropriate and require a standard individual permit review of the proposal.
5. The LOP does not have an expiration date; however, the Corps will conduct periodic reviews to ensure the LOP continues to meet the Corps' Regulatory Program regulations and policies. The Corps will conduct the first review, in coordination with USFWS, EPA, KDFWR, and KDOW, within two years of the effective date of the LOP.

APPLICATION PROCEDURES:

Applicants proposing to conduct work under the proposed LOP will submit a complete application to the appropriate District, and receive written notification that the proposed work is authorized by the LOP, prior to the commencement of work in "waters of the U.S." The applicant must submit the standard Department of the Army (DA) permit application form (ENG 4345), including the information listed in 1 through 13 below.

1. Name, address, and phone number of the applicant.
2. Location of the proposed work, including latitude and longitude in decimal degrees.
3. Brief description of the project, including purpose, the total size (linear distance and acreage) of the proposed structures or fill areas, fill quantity and type of fill being used, type and acreage of

wetland(s) to be filled, and flow regimen (perennial, intermittent, ephemeral), linear distance and acreage of proposed stream fill(s). Impacts, in the appropriate units/credits, must also be provided.

4. A draft jurisdictional determination (RGL 08-02).
5. Drawings on 8 ½ x 11-inch paper, including a location map, and plan and cross-section drawings illustrating all work to be done and the location of the "waters of the U.S." These drawings must provide the exact dimensions and scale, must be legible and reproducible in black in white or grey scale.
6. For any project that impacts jurisdictional wetlands, a wetland delineation report is required and must conform to the Corps of Engineers' Wetland Delineation Manual, Technical Report Y-87-1, and the appropriate Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual.
7. For any project that requires mitigation, functional assessment scores and/or narrative documentation must be provided for the existing conditions of the proposed impact(s). A mitigation proposal, including either a: 1) request to purchase credits from a Corps approved Mitigation Bank or In-Lieu Fee Program, 2) request to use released credits from the applicant's Corps approved Mitigation Bank, or 3) request to develop permittee-responsible mitigation, must also accompany the application.
8. For permittee responsible mitigation, a project specific Mitigation Plan consistent with the Corps' current regulations and policies (e.g. 2008 Mitigation Rule, RGL 08-03, District mitigation guidance/standard operation procedures).
9. Summary of avoidance and minimization measures.
10. Summary of alignment alternatives or completed alternatives analysis.
11. Copies of all coordination letters from the KYSHPO and the USFWS (see General Conditions 12 and 13), documenting coordination and compliance with the Endangered Species Act and the National Historic Preservation Act.
12. Individual Water Quality Certification, Water Quality Certification-LOP, general certification or waiver, if required by the KDOW.
13. Other information, as determined by the Corps.

AGENCY COORDINATION:

Complete application packages will be distributed to the above state and federal agencies ("the agencies") by the applicant. Applicants are encouraged to send the packages by registered mail with return receipt requested. The Corps will notify the agencies that the comment period has commenced. The agencies will have 21 days to provide written or email comments, from an appropriate management level, to the appropriate District once they have received the complete application package and been notified by the Corps that the comment period has commenced. The Corps may extend this comment period by 14 days.

The USFWS and the USEPA retain the option to refer individual pending projects through the procedures outlined in the 1992 Memorandums 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.

EXCLUDED ACTIVITIES:

1. Activities that are denied any required local, State or Federal authorization.
2. Activities that the Districts determine to have the potential to cause unacceptable adverse impacts to aquatic resources or other public interest factors. The Districts may, on a case-by-case basis, require an individual DA permit. The Districts will notify the applicant that the project does not qualify for the LOP and instruct the applicant that authorization must be obtained under the standard Individual DA permit process. The Districts may also require an Individual DA permit for any After-the-Fact applications and/or any unauthorized activity regardless of whether or not the discharge meets the acreage and linear footage threshold limitations of this proposed LOP.

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 Districts will consider the direct, secondary, and cumulative impacts of the fill or work and any mitigation measures.
2. Impacts resulting from the discharge of fill into "waters of the U.S." in excess of 300 linear feet of intermittent or perennial stream; the filling of greater than 0.10 acre (4,356 sq. feet) of

"waters of the U.S."; or work causing more than minimal effects, will require mitigation to compensate for these impacts. The impact thresholds are applied for each crossing. When mitigation is required, the permittee shall purchase credits from a Corp's approved Mitigation Bank or In-Lieu Fee Program, use released credits from a Corps approved Permittee Mitigation Bank or develop a permittee-responsible mitigation project. The permittee will develop the mitigation project concurrently with, or in advance of, the site construction unless the Corps determines on a project specific basis that it is not practical to do so. This will ensure that aquatic functions are not lost for long periods of time (e.g. temporal loss) which could adversely affect water quality and wildlife. A Permittee-responsible mitigation project shall include a project-specific Mitigation Plan, consistent with the Corps' current regulations and policies (e.g. 2008 Mitigation Rule, RGL 08-03, District mitigation guidance and/or standard operation procedures for mitigation).

3. The permittee shall ensure that sedimentation and soil erosion control measures are in place prior to commencement of construction activities. These measures will remain in place and be properly maintained throughout construction. Sedimentation and soil control measures shall include the installation of straw bale barriers, silt fencing, sediment basins, water bars 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.

4. The permittee shall ensure that areas disturbed by any construction activity, including channel and stream banks, are immediately stabilized and revegetated with a combination of non-invasive plants (herbs and shrubs) which are compatible with the affected area and will not compete with native vegetation.

5. The permittee shall ensure that no in-stream construction activity is performed during periods of high stream flow or during the fish spawning season (April 1 through June 30) without first contacting the Kentucky Department of Fish and Wildlife Resources (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.

6. 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.

7. 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.

8. The permittee must comply with any case specific special conditions added by the Corps or by the Kentucky Section 401 Water Quality Certification (WQC). The conditions imposed in the Kentucky Section 401 WQC are also conditions of this LOP.

9. The permittee shall ensure that no activity authorized by the LOP may cause more than a minimal adverse effect on navigation.

10. The permittee shall ensure proper maintenance of any structure or fill authorized by the LOP, in good condition and in conformance with the terms and conditions of the LOP, including maintenance to ensure public safety. The permittee is not relieved of this requirement if the permitted activity is abandoned, although the permittee may make a good faith transfer to a third party. Should the permittee wish to cease to maintain the authorized activity or desire to abandon it without a good faith transfer, the permittee must obtain a modification to the LOP from the Corps, which may require restoration of the area.

11. 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).

12. 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, or which is likely to destroy or adversely modify the critical habitat of such species. The permittee shall notify the Corps and coordinate the proposed action with the USFWS to determine if any listed species or critical habitat might be affected and/or adversely modified by the proposed work. No activity is authorized under the LOP which "may affect" a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been

completed. At the direction of the Corps, the permittee shall complete the necessary consultation with the USFWS, satisfying the requirements of Section 7(a)(2) of the Endangered Species Act. The permittee shall not begin work until notified by the District Engineer that the requirements of the Endangered Species Act 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 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.

Obligations under Section 7 of the Act must be reconsidered by the Corps Districts 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.

13. The permittee shall not perform any activity under the LOP which may affect historic properties listed, or eligible for listing, in the National Register of Historic Places until the District Engineer has complied with the provisions of 33 CFR Part 325, Appendix C. The permittee must notify the District Engineer if the activity authorized by the LOP may affect any historic properties listed, determined to be eligible or which the permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not begin construction until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the Kentucky Heritage Council.

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 regarding the discovery. 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.

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

15. No activity, including structures or works 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.

16. 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 the structure or discharge of fill 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.

17. 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 elevation.

18. Representatives from the Corps of Engineers and/or the Commonwealth of Kentucky may inspect any authorized activity or mitigation site at any time deemed necessary to ensure compliance with the terms and conditions of the LOP, Section 401 WQC, and applicable laws.

19. All work authorized by this LOP must be completed within five years after the date of the Corps authorization letter. 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.

20. 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.

21. You must allow representatives from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished with the terms and conditions of the LOP.

22. For Section 10 waters, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable

Operations Division
Regulatory Branch (South)
I.D. No. LRL-2006-259

waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.