



**US Army Corps
of Engineers**

Louisville, Nashville,
Memphis and Huntington
Districts ®

Public Notice

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Date:
27 September 11

Closing Date:
NA

Please address all comments and inquiries to:
U.S. Army Corps of Engineers, Louisville District
ATTN: Dr. Patricia A. Grace-Jarrett, Ph. D., CELRL-OP-FS, Rm 752
P.O. Box 59
Louisville, Kentucky 40201-0059

Phone: 502-315-6687

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

This notice announces that on September 27, 2011, the Louisville, Nashville, Huntington, and Memphis Districts of the U.S. Army Corps of Engineers (the "Corps"), issued a Letter of Permission (LOP), 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 LOP supports the implementation 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).

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.," and adjacent wetlands associated with these waters. 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 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.

1. Early Coordination:

(a) The Bank or ILF Sponsor will initiate Early Coordination of the compensatory mitigation projects with the applicable Corps District,

the Interagency Review Team (IRT) and the Kentucky State Historic Preservation Officer (KYSHPO). 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 CFR Part 325, Appendix C, and General Conditions 4, 7, and 11. If adverse effects may occur to listed species or NRHP-eligible or -listed properties, the Sponsor will notify the Corps so federal consultation may be initiated. Generally, applications shall not be submitted for consideration under the LOP if adverse effects are likely to occur.

Projects to be implemented on State lands must be compliant with State antiquities laws. Coordination with the KYSHPO must be initiated prior to the pre-application site visit.

(b) Pre-Application Site Visit: The Sponsor will contact the District, the IRT, and the KYSHPO 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/SOPs, and a jurisdictional determination (JD) to the District, the IRT, the KYSHPO, 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, the KYSHPO, and other coordinating agencies for a period of 15 days from the date of the Pre-Application Site Visit. Copies of comments which are received during this period will be forwarded by the Corps to the Sponsor for consideration.

2. Complete LOP/Section 404 DA Application: The Sponsor will submit a complete DA application for compensatory mitigation projects to be considered under the LOP. The Complete LOP Application shall include: a) an Individual WQC, WQC-LOP, or waiver issued by the KDOW; b) a JD;

c) wetland report (consistent with the Corps' 1987 Wetland Delineation Manual and regional supplements); d) stream quality or condition/functional assessment; and e) any correspondence in accordance with the Endangered Species Act (ESA) and the NHPA. The Complete LOP Application shall also include a complete Project Mitigation Plan, consistent with the Mitigation Rule and any available District Guidance/SOPs, a list of adjoining property owners and other items as necessary for the evaluation of the DA application. The Complete LOP Application shall be submitted concurrently to the Corps, the IRT, and to other appropriate coordinating agencies.

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, the Corps shall notify the public. The Corps shall also initiate IRT consultation through email notification. The IRT consultation shall extend for a period of 30 days. The Corps shall accept written comments 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 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." A complete application includes the submittal of the standard DA permit application form ENG 4345, any items deemed necessary by the Corps, and the information listed in 1 through 8 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 (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 impacts 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. For any site impacting streams, documentation of stream flow regimen and stream quality, condition, or function is required.

5. A jurisdictional determination (JD) is required for all compensatory mitigation projects.

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.
- 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 the ESA and the NHPA. Copies of studies, reports, or other documentation must be included.

8. An Individual WQC, WQC-LOP, or waiver issued by the KDOW.

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 or which do not result in a net aquatic

3. resource benefit. As discussed above, the District may, on a case-by-case basis, require a Standard Individual DA permit.

4. Projects which would result in adverse effects to NRHP-eligible or -listed properties 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 or by the State Section 401 WQC. The conditions imposed in the State Section 401 WQC are also conditions of this LOP.

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 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, Section 401 WQC, 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

