



Public Notice

**US Army Corps
of Engineers**
Louisville, Huntington,
Nashville and Memphis
Districts

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LOP No. 200600259-pgj

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3 Oct 07

Expiration Date:
1 Nov 07

Please address all comments and inquiries to:
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NOTICE ANNOUNCING ISSUANCE OF A LETTER OF PERMISSION

This notice announces that on October 3, 2007, the Louisville, Nashville, Huntington and Memphis Districts U.S. Army Corps of Engineers (the Districts) 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 and Section 404 of the Clean Water Act (CWA). The LOP also supports 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.

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. Construction of roadway embankments and bridge abutments;
4. Installation of additional traffic lanes to existing roadways;
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;
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 placement 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 that is authorized by this LOP will also be 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 new alignment and realignment 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) for critical resources, the U.S. Fish and Wildlife Service (USFWS) in accordance with the Endangered Species Act, and the Kentucky State Historic Preservation Officer (SHPO) in accordance with the National Historic Preservation Act. This will allow the early screening of proposed alignments and screening for State critical resources, 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, 12 and 13. This coordination will be accomplished by regular, prearranged meetings hosted by the Districts and applicants such as the Kentucky Transportation Cabinet.
- b. The applicant will conduct early coordination with USFWS and SHPO 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 in writing 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." A copy of the complete application package will be provided concurrently to the KDOW, the KDFWR, the Kentucky SHPO, the USFWS, and the USEPA. Project notification requires the submittal of the standard Department of the Army (DA) permit application form ENG 4345 that must include the information listed in 1 through 9 below.

1. Name, address, and phone number of the permittee.

2. Location of the proposed work to include latitude and longitude or UTM.

3. Brief description of the project including purpose, the size (linear distance and acreage) of the proposed structure or fill area, fill quantity and type of fill being used, acreage and type of wetland to be filled, and flow regimen (perennial, intermittent, ephemeral), linear distance and area of proposed stream fills.

4. Drawings on 8 ½ x 11-inch paper, including a location map, and plan and cross-section drawings illustrating all work to be done. These drawings must provide the exact dimensions and scale, must be legible and reproducible in black in white or grey scale.

5. 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. The site report, with data forms and maps locating the data points depicting the locations(s) of wetlands or other jurisdictional waters, must be provided.

6. For any project that impacts "waters of the U.S." requiring mitigation, functional assessment scores and/or narrative documentation

must be provided for the existing conditions of the proposed impact and mitigation sites and for the predicted final quality of the mitigation.

7. A project specific mitigation and monitoring plan that is consistent with the Corps' current regulations and policies (e.g. Regulatory Guidance Letters 02-02, 06-03, local District guidance on mitigation). Mitigation will be implemented concurrently with, or in advance of, the site construction unless the Corps determined on a case-by-case basis that it is not practical to do so.

8. Summary of alignment alternatives or completed alternatives analysis.

9. Copies of any coordination letters from the KDFWR, KDOW, the Kentucky SHPO, USEPA and the USFWS (see General Conditions 5, 12 and 13), documenting coordination and compliance with the Endangered Species Act and the National Historic Preservation Act.

AGENCY COORDINATION:

The above state and federal resource agencies will have 21 days to provide written comments, or email comments from an appropriate management level, to the appropriate District once the application package is received by them. Applicants are encouraged to send the packages by registered mail with return receipt requested. 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. The permittee shall provide a mitigation/monitoring plan for impacts resulting from the placement 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, to compensate for impacts to the "waters of the U.S." These impact thresholds are applied for each crossing. When mitigation is required, the permittee will develop the mitigation site 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. The requirement for conservation easements or deed restrictions will be determined on a project specific basis.

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 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 (grasses, legumes 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 State Section 401 Water Quality Certification (WQC). The conditions imposed in the State 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 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.

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 State 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 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.