



US Army Corps
of Engineers
St Paul District

**REFER TO:
LOP-10-FDL**

Public Notice

ISSUED: October 5, 2010

File # 2008-2948-DWW

SECTION:404 - Clean Water Act

ISSUANCE OF LETTER OF PERMISSION PROCEDURES FOR LOP-10-FDL, APPLICABLE WITHIN THE EXTERIOR BOUNDARIES OF THE FOND DU LAC RESERVATION LOCATED IN CARLTON AND ST. LOUIS COUNTIES, MINNESOTA

1. PURPOSE OF THIS PUBLIC NOTICE

The purpose of this public notice is to announce the issuance of new letter of permission (LOP) categories and procedures applicable within the external boundaries of the Fond du Lac Reservation (Reservation).

2. BACKGROUND

Historically the St. Paul District has reviewed projects on the Fond du Lac Reservation using the standard individual permit process. In 2009 the Fond du Lac Band of Lake Superior Chippewa (FDL) requested the St. Paul District consider developing LOP categories and procedures for certain projects within the Reservation. On June 10, 2010, a public notice was issued describing the proposed categories of activities to be covered by the LOP, and requesting comments. The comment period closed on July 12, 2010.

One comment was received suggesting inclusion of expedited procedures for emergency repairs or actions for damage to utilities such as pipelines and spills. LOPs include coordination with several agencies and environmental analysis of the proposal, including a NEPA analysis, an alternatives analysis, a public interest review, and a determination that the proposal is in compliance with the Clean Water Act 404(b)(1). We agree that an expedited permitting process for these types of events would be useful, but believe there are more effective and responsive solutions than LOP procedures.

3. ADDITIONAL INFORMATION

LOP-10-FDL categories and procedures have been developed in accordance 33 CFR 235.2(e)(1).

An environmental assessment will be prepared for each project reviewed under these LOP procedures to determine whether the project complies with the guidelines set forth under Section 404(b)(1) of the Clean Water Act, and is otherwise in the public interest.

The decision whether to issue a permit will be based on an evaluation of the probable impact, including cumulative impacts, of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources. The benefit which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered, including the cumulative effects. Among those are conservation, economics,

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aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production and, in general, the needs and welfare of the people. Environmental and other documents will be available for review in the St. Paul District Office.

4. CLEAN WATER ACT SECTION 401 CERTIFICATION

The FDL requires applicants to obtain individual Section 401 certifications for all projects that are eligible for review under these LOP procedures. The LOP terms and conditions include general Section 401 conditions that the Band has determined will apply to all LOPs granted Section 401 certification. Inclusion of the general terms and conditions assists applicants in designing a permissible project. The FDL requested that projects impacting impaired waters be excluded from this LOP process. Accordingly, this request has been included as paragraph 1(c) of the LOP procedures. Both the Section 401 and 404 general conditions may be viewed in LOP-10-FDL attached to this PN, or they may be viewed at our web site at, <http://www.mvp.usace.army.mil/regulatory/>. Once the Corps receives the FDL's final water quality certification for a specific project, the Corps will finalize its assessment and permit decision and forward the decision to the applicant. A copy of the Section 401 certification will be attached to any permit issued.

5. CONTACT INFORMATION

Questions may be directed to Daryl Wierzbinski at 218-834-6630. Inquiries may also be submitted through the web site or mailed to the Regulatory Branch, St. Paul District, Corps of Engineers, 180 Fifth Street East, Suite 700, Saint Paul, MN 55101-1678.



Tamara Cameron
Chief, Regulatory Branch

Enclosure

NOTICE TO EDITORS: This public notice is provided as background information and is not a request or contract for publication.

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CLEAN WATER ACT SECTION 404 LOP PROCEDURES, TERMS, AND CONDITIONS FOR PROJECTS LOCATED WITHIN THE FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA RESERVATION

Project proponents should carefully read all of the information below, with special attention to the General Conditions section. These provisions and conditions apply to all LOP-10-FDL authorizations.

LOP-10-FDL applies to projects located within the external boundaries of the Fond du Lac Band of Lake Superior Chippewa (FDL) Indian Reservation in St. Louis County and Carlton County, Minnesota. The St. Paul District web page: www.mvp.usace.army.mil/regulatory also contains helpful information for applicants.

1. EXCLUSIONS FROM LOP-10-FDL AUTHORIZATIONS

a. Diversions of Water. LOP-10-FDL may not be used to authorize all or any portion of a project that would divert more than 10,000 gallons/day of surface water or groundwater into or out of the Great Lakes Basin.

b. Projects not located within external boundaries of the Fond du Lac Band of Lake Superior Chippewa Indian Reservation in St. Louis County and Carlton County, Minnesota.

c. Discharges to Outstanding Reservation Resource Waters (ORRWs) as described in Section 105(b)(3) of the Water Quality Standards of the Fond du Lac Reservation, Ordinance 12/98, as amended, are not authorized. Although additional waters

may be designated in the future, currently Perch Lake, Rice Portage Lake, Miller Lake, Deadfish lake, and Jaskari Lake, all on the Fond du Lac Reservation, are designated as ORRWs.

2. ACTIVITIES ELIGIBLE FOR LOP-10-FDL AUTHORIZATION

a. Public road projects that impact less than 5 acres of waters of the U.S., including jurisdictional wetlands.

b. Public and private projects that impact less than 3 acres of waters of the U.S., including jurisdictional wetlands.

3. APPLICATION

a. Applicants must submit a complete application to the St. Paul District of the Corps of Engineers using either the joint state-Federal application form that is available from the St. Paul District, MDNR, and BWSR offices and on their respective websites:

www.mvp.usace.army.mil/regulatory

www.dnr.state.mn.us/waters/watermgmt_section/pwpermits/applications.html

www.bwsr.state.mn.us/wetlands/wcaforms/index.html

or the Corps of Engineers application form (ENG FORM 4345) that is available on the US Army Corps of Engineers Headquarters website at:

www.usace.army.mil/CECW/Pages/cwo_reg.aspx

b. Upon receipt of a permit application, the St. Paul District will review the information to determine the completeness of the application and eligibility for LOP-10-FDL.

c. A complete application consists of the following information:

1. Name and address of the applicant and authorized agent.

2. A description of the proposed activity. The description should be of sufficient detail to provide a thorough understanding of the project so that it can be explained to other agencies and the general public.

3. The application should identify all activities that affect waters of the U.S. and that are reasonably related to the project for which an application has been submitted (see definition of Single and Complete Project under Definitions, below).

4. Name and address of adjacent landowners.

5. The application should identify the name of the watercourse or wetland impacted and the specific location of the impact(s).

6. A description of any work already completed as part of the project in waters of the U.S.

7. Signature of Applicant or authorized agent.

8. Drawings, plans, or sketches of sufficient detail to understand the existing and proposed conditions at the site. Detailed engineering plans and specifications may be required.

9. In some cases, the District may require a wetland delineation prepared in accordance with the 1987 CORPS OF ENGINEERS WETLAND DELINEATION MANUAL and the Regional

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Supplement before the application will be considered complete.

Applicants are encouraged to obtain the services of professional consultants in planning projects and preparing applications, wetland determinations-delineations, and compensatory mitigation plans. The District does not endorse any consultants; however, the District maintains a list that is available on its website, of consultants that have asked to be listed as being available for hire to perform such services.

10. The District may request additional information from the applicant in order to complete its public interest review. This information is not required for a complete application, but may be necessary in order for the District to make a decision on the permit application. The additional information could include, but is not limited to, an alternatives analysis, dredged material testing plan, and/or a compensatory mitigation plan, for example.

11. Once an application has been determined to be complete, the District will conduct its evaluation of the permit application as described in the following paragraphs.

4. COORDINATION PROCEDURES UNDER LOP-10-FDL

Once the District has determined that the application is complete, a description of the proposal

will be posted on the District's web site.

At a minimum, the Internet notice will identify the applicant, project location and nature, approximate impacts, sketches if appropriate, and any proposed/required compensatory mitigation. The notice will include a brief project description and describe how to respond to the appropriate District regulatory project manager.

The Fond du Lac Band will be notified of all postings by e-mail. Notification of postings will be e-mailed to the USFWS, MNDNR, USEPA, and the 1854 Treaty Authority for the following projects:

- a. All projects that impact more than 0.5 acre of waters of the U.S.
- b. All projects that result in a discharge of dredged or fill material in designated trout streams or wetlands contiguous with and within 300 feet of the trout stream.

The Corps will coordinate projects with MPCA in those cases where there may be impacts to surface waters that are tributary to waters of the state of Minnesota. Upon request the Corps will provide MPCA a copy of the application.

These agencies will have 10 days from being notified to inform the District that they wish to provide comments.

In those cases where the agencies have informed the District that they wish to provide comments, they will have an additional 20 days to provide those comments to the designated project manager.

Coordination with Indian Tribes will be performed as discussed under FEDERAL TRUST RESPONSIBILITY TO INDIAN TRIBES on page 4 of this document.

The District will consider all comments and information received during the public/interagency review in completing its evaluation of the proposed activity.

5. ENDANGERED SPECIES

a. No activity is authorized which is likely to adversely affect 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, except as noted in Section b below. Non-federal permittees shall notify the District 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 that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized.

b. Authorization of an activity 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 or the National Marine Fisheries 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

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habitat can be obtained directly from the offices of the U.S. Fish and Wildlife Service and National Marine Fisheries Service or their World Wide Web pages on the Internet.

c. If it becomes apparent that a Federally listed endangered plant or animal species will be affected by work authorized by this permit, work must be stopped immediately and the St. Paul District of the Corps of Engineers must be contacted for further instruction.

6. HISTORIC PROPERTIES AND CULTURAL RESOURCES

No activity which may affect historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, until the DE has complied with the provisions of 33 CFR part 325 Appendix C.

Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office, the National Register of Historic Places, and Tribal cultural resource office.

7. COMPENSATORY MITIGATION

Compensatory mitigation shall be designed to replace the aquatic resource functions lost as result of the project.

The District will determine appropriate compensatory mitigation requirements on a case-by-case basis in accordance with Federal guidelines and established District policy.

Under many circumstances, compensatory mitigation required by the Fond du Lac Band of Lake Superior Chippewa Indian Reservation under their ordinances, may satisfy the Clean Water Act mitigation requirement.

In determining compensatory mitigation requirements, the Corps will consider any mitigation requirements required by Fond du Lac Band. In many cases, one acre of compensatory mitigation performed in place, in kind, and in advance, may be considered sufficient to replace the functions of one acre of wetland impacted or lost.

Use of Corps-approved mitigation banks or in-lieu fee procedures may be acceptable methods of providing compensatory mitigation.

Mitigation for stream and lake impacts may be required on a case-by-case basis.

8. AUTHORIZATION CRITERIA

The District will review each application for compliance with the LOP-10-FDL terms and conditions, conduct a public hearing if one is warranted, and complete a 404(b)(1) analysis and environmental assessment. The District will generally issue a letter of permission authorizing those projects found to be in compliance with all terms and conditions of LOP-10-FDL and the Section 404(b)(1) guidelines, provided the District determines that the proposed work is not contrary to the public interest.

The Corps may add project specific conditions, to any authorization to assure the project is in the overall public interest.

Applicants are encouraged to help speed the District evaluation and increase the chance of receiving a favorable interagency review and authorization by including information

with their application that clearly shows that the proposed work is the least environmentally damaging way that is practicable to accomplish the basic purpose of the project. The District will generally deny any request for authorization under the LOP-10-FDL unless the applicant demonstrates that the work proposed is the least environmentally damaging practicable alternative to accomplish the basic project purpose, and that impacts to waters of the U.S. cannot reasonably be avoided or further minimized. The District must also deny authorization for any regulated activity that it determines is contrary to the public interest.

The District will do the level of analysis required to determine whether or not the proposal meets all authorization criteria. The LOP-10-FDL will identify any compensatory mitigation requirements and any project-specific conditions deemed necessary by the District to insure that the proposed work meets the authorization criteria.

9. DEFINITIONS

Calculation of Aquatic Impact Thresholds: For those activities with threshold limits, impacts shall be determined by calculating area of waters of the U.S. filled plus the impacts to waters of the U.S. that are excavated, inundated, or drained as a result of the regulated discharge. The impacts of temporary fills shall be included in this calculation.

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Single and Complete Project:

The total project proposed by the project proponent. For example, if construction of a residential development or linear project such as a road or utility line affects several different areas of waters of the U.S., the cumulative total of all these filled areas is the basis for deciding the project's total wetland/water impact. For "phased" developments, each phase may constitute a single and complete project if it has independent utility and would accomplish its intended purpose whether or not other phases were constructed.

9. OTHER INFORMATION

a. FEDERAL TRUST RESPONSIBILITY TO INDIAN TRIBES. All LOP-10-FDL projects will be coordinated with the appropriate Indian Tribal governments. The Indian Tribe's views and the Federal trust responsibility will be considered in the District's LOP-10-FDL evaluation.

b. PROJECT-SPECIFIC LOP-10-FDL CONDITIONS. The District evaluation will identify any need for project-specific special conditions and require such conditions to minimize adverse project impacts and/or protect the public interest.

c. FORM AND CONFIRMATION OF AUTHORIZATION. Every LOP-10-FDL authorization will be confirmed in writing by the St. Paul District via a letter of authorization to the project applicant or

authorized agent once the Corps has received an affirmative Section 401 Water Quality Certification from the Fond du Lac Band.

d. FEDERAL AND STATE ENDANGERED SPECIES AND CULTURAL RESOURCES. LOP-10-FDL does not affect the Corps responsibility to insure that all Section 404 authorizations comply with Section 7 of the Federal Endangered Species Act and Section 106 of the National Historic Preservation Act. No Corps permit will be granted for projects found not to comply with these Acts.

e. MODIFICATION OF PROCEDURES. The St. Paul District has authority to modify, revoke, or suspend these procedures at any time it determines that circumstances concerning the public interest warrant such action.

10. GENERAL CONDITIONS

a. The time limit for completing work authorized by an LOP-10-FDL permit ends three years after the date of the Corps' authorization letter. If you find that you need more time to complete the authorized activity, submit your request for a time extension to the Corps for consideration at least three months before the expiration date is reached.

b. You must maintain the authorized activity in good condition and in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you may make a good faith transfer to a third party. Should you wish to cease to maintain the authorized activity or should you desire to abandon it without a good faith transfer, you must obtain a modification of this permit from this office, which may require restoration of the area.

c. If you discover any previously unknown historic or archaeological remains while accomplishing the authorized activity you must immediately stop work and notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing on the National Register of Historic Places.

d. If a conditioned water quality certification has been issued for your project, you must comply with the conditions specified in the certification as special conditions to the LOP-10-FDL authorization. A copy of the certification will be attached to the LOP-10-FDL authorization if it contains such conditions.

11. SECTION 401 WATER QUALITY GENERAL CONDITIONS

The following general water quality conditions provided by the Fond du Lac Band apply to all projects authorized under LOP-10-FDL:

a. Impacts to waters of the Fond du Lac Reservation other than those specifically authorized and addressed in the plans, specifications, application materials, permit, and the Water Quality Certification are prohibited. All lakes, streams, rivers, springs, and wetlands shall be fully protected prior to, during, and after construction until the area is stabilized.

b. All work shall be carried out in such a manner as will prevent violations of water

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quality criteria as stated in the Water Quality Standards of the Fond du Lac Reservation, Ordinance 12/98, as amended. This includes, but is not limited to, the prevention of any discharge that causes a condition in which visible solids, bottom deposits, or turbidity impairs the usefulness of waters of the Fond du Lac Reservation for any of the uses designated in the Water Quality Standards of the Fond du Lac Reservation. These uses include Public Water Supply, Wildlife, Aquatic Life, Cold Water Fisheries, Warm Water Fisheries, Subsistence Fishing (Netting), Primary Contact Recreation, Secondary Contact Recreation, Cultural, Wild Rice Areas, Aesthetic Waters, Agricultural, Navigation, and Commercial.

c. Appropriate steps shall be taken to ensure that petroleum products or other chemical pollutants are prevented from entering waters of the Fond du Lac Reservation. All spills must be reported to the appropriate emergency management agency, and measures shall be taken immediately to prevent the pollution of waters of the Fond du Lac Reservation, including groundwater. The Fond du Lac Reservation Office of Water Protection shall also be notified immediately of any spill occurring on the Fond du Lac Reservation.

d. To prevent the introduction of invasive species, ALL contractors and subcontractors must high pressure wash ALL

equipment, trailers, and vehicles before use on the Fond du Lac Reservation.

e. All seed mixes, whether used for temporary stabilization or permanent seeding, shall NOT contain any ryegrass (*Lolium* species). Oats (*Avena* species) or Wild rye (*Elymus* species) may be used as a replacement. In addition, non-native (not native to Carlton County, St. Louis County, or northeastern Minnesota) plant species may NOT be used in any seed mix without prior approval from the Office of Water Protection.

f. All erosion and sediment control Best Management Practices (BMPs) shall be appropriately selected, properly installed, maintained in good condition, regularly inspected for effectiveness, replaced if not effective, and properly removed (if not a permanent BMP) once the area has been properly stabilized or revegetated.

g. In addition to these conditions, Fond du Lac reserves the right to impose additional conditions when the actual 401 Water Quality Certification is issued for a specific project seeking coverage under LOP-10-FDL.

h. 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 in accordance with the terms and conditions of LOP-10-FDL.

FURTHER INFORMATION

1. Congressional Authorities: You have been authorized to undertake the activity described above pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344).

2. Limits of this authorization.

a. This LOP does not obviate the need to obtain other Federal, state, or local authorizations required by law.

b. This LOP does not grant any property rights or exclusive privileges.

c. This LOP does not authorize any injury to the property or rights of others.

d. This LOP does not authorize interference with any existing or proposed Federal project.

3. Limits of Federal Liability. In authorizing work, the Federal Government does not assume any liability, including but not limited to 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

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modification, suspension, or revocation of this permit.

4. Reliance on Applicant's Data: The determination of this office that issuance of this permit is not contrary to the public interest was made in reliance on the information you provided.

5. Reevaluation of Permit Decision. This office may reevaluate its decision on this permit at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:

a. You fail to comply with the terms and conditions of this permit.

b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (see 4 above).

c. Significant new information surfaces which this office did not consider in reaching the original public interest decision. Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you to comply with the terms and conditions of your permit and for the initiation of legal action where appropriate. You will be required to pay

for any corrective measures ordered by this office, and if you fail to comply with such directive, this office may in certain situations (such as those specified in 33 CFR 209.170) accomplish the corrective measures by contract or otherwise and bill you for the cost.

6. Extensions. General condition 1., above, establishes a time limit for the completion of the activity authorized by this permit. Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, the Corps will normally give favorable consideration to a request for an extension of this time limit.