US Army Corps
of Engineers
St Paul District

Public Notice

ISSUED: 31 July, 2006

SECTION: 404–Clean Water Act

REFER TO: LOP-05-MN (2005-825-RJA)

ISSUANCE OF LETTER OF PERMISSION PROCEDURES, LOP-05-MN, APPLICABLE IN THE STATE OF MINNESOTA EXCEPT WITHIN THE EXTERIOR BOUNDARIES OF INDIAN RESERVATIONS.

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, for the state of Minnesota. This new LOP (LOP-05-MN), is attached.

2. BACKGROUND.
On February 21, 2006, the St. Paul District issued a public notice that described and requested public comment on its proposal to replace the letter of permission portion of GP/LOP-98-MN with LOP-05-MN throughout the state of Minnesota, except within the exterior boundaries of Indian Reservations.

In the year 2000, the St. Paul District replaced all of the Corps Section 404 nationwide permits (NWPs) in the states of Minnesota and Wisconsin with a combination of regional general permits (GPs) and letter-of-permission evaluation procedures (LOPs): GP/LOP-98-MN and GP/LOP-98-WI, respectively. In addition, a similar GP/LOP-98-R was issued for all Indian reservations in both states. GP/LOP-98-MN, originally scheduled to expire on January 31, 2005, was re-authorized, and expires on July 31, 2006.

The St. Paul District will continue to use Section 404 GPs and LOPs in place of the nationwide general permits. However, instead of combining the GP and LOP procedures into an integrated package, we are issuing GPs and LOP categories and procedures as separate and distinct documents. The reason for doing so is that general permits are actual issued permits that must be reviewed and re-authorized every five years. In contrast, letters of permission are abbreviated individual permits. Once a process for their evaluation is established and published, they do not need to be changed unless conditions warrant. Activities authorized by the LOP require application to and response from the Corps of Engineers.

The Minnesota Department of Natural Resources (MnDNR) considered the general and standard conditions that were part of the GP/LOP-98-MN package to be important and suggested that they be incorporated into the LOP-05-MN. Many of the conditions contained in GP/LOP-98-MN will be used in LOP authorizations as special conditions rather than general or standard conditions when the individual project review concludes they are warranted. Some of the conditions MnDNR refers to would apply to all projects and have been added as standard conditions.

Minor changes were made to the paragraph titled *Federal Trust Responsibilities to Indian Tribes*, in the section titled *Other Information* to clarify our responsibilities.

Minor formatting changes were made throughout the document for clarity.

3. ADDITIONAL INFORMATION

LOP-05-MN is issued according to the provisions of Section 404 of the Clean Water Act and includes consideration of the guidelines set forth under Section 404(b) of the Clean Water Act (40 CFR 230). Each LOP issued is supported by an abbreviated environmental assessment, public interest review and Section 404(b)(1) guidelines concurrence determination.

LOP-05-MN does not affect any existing or future Department of the Army Section 10 of the Rivers and Harbors Act NWPs, or any regional GPs in Minnesota.

Mitigation sequencing (avoidance, minimization and compensation) is required for projects authorized by a LOP under Section 404. The threshold for requiring compensation varies by county depending on the percentage of wetland lost since the time of the pre-settlement land surveys. The District may deviate from these general guidelines on a case-by-case basis when it determines that it is appropriate to do so.

4. Coastal Zone Management. Projects authorized under LOP-05-MN have been determined consistent with the Minnesota Coastal Zone Management Program.

5. Section 401 Water Quality Certification. MPCA has waived Sec. 401 water quality certification for projects authorized under LOP-05-MN.

6. LOP-05-MN may be viewed on the District Internet web site at: http://www.mvp.usace.army.mil under the "Permits" section. Questions may be directed to Mr. Ralph Augustin in our St. Paul office at 651-290-5378. Inquiries may also be submitted through the web site or mailed to: Regulatory Branch, St. Paul District, Corps of Engineers, 190 Fifth Street East, St. Paul, Minnesota, 55101-1638.

Robert J. Whiting
Chief, Regulatory Branch

CLEAN WATER ACT SECTION 404 LOP PROCEDURES, TERMS, AND CONDITIONS FOR THE STATE OF MINNESOTA

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 authorizations in those portions of Minnesota outside the external boundaries of Federally recognized Indian Reservations. The St. Paul District web page: www.mvp.usace.army.mil/regulatory also contains helpful information for applicants.

1. **EXCLUSIONS FROM LOP AUTHORIZATIONS:**

A. Diversions of Water. A LOP 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 within external boundaries of Federally recognized Indian Reservations in Minnesota.

2. **CATEGORIES OF ACTIVITIES ELIGIBLE FOR LOP 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**

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

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-05-MN. A complete application consists of the following information:

a. Name and address of the applicant and authorized agent.
b. 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.
c. 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).
d. Name and address of adjacent landowners.
e. The application should identify the name of the watercourse or wetland impacted and the specific location of the impact(s).
f. A description of any work already completed as part of the project in waters of the U.S.
g. Signature of Applicant or authorized agent.
h. 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.
i. In some cases, the District may require a wetland delineation prepared in accordance with the 1987 CORPS OF ENGINEERS WETLAND DELINEATION MANUAL 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.

The District may request additional information from the applicant in order to complete the 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.

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-05-MN

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.

Notification of postings will be emailed to USFWS, MDNR, MPCA, USEPA, CZM for the following projects:

a. All projects that impact more than 0.5 acre of waters of the U.S.
b. All projects in areas designated as the Topeka shiner critical habitat
c. All projects in areas designated as the grey wolf critical habitat
d. All projects in areas designated as piping plover critical habitat.
e. 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.
f. All projects that result in a discharge of dredged or fill material in calcareous fens or wetlands contiguous with and within 300 feet of the fen
g. All projects within a component of a Federal Wild and Scenic River.

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 item 1. FEDERAL TRUST RESPONSIBILITY TO INDIAN TRIBES in OTHER INFORMATION on page 3 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.

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 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.

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 and the National Register of Historic Places.

COMPENSATORY MITIGATION

Compensatory mitigation shall be designed to replace the 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.

Compensatory mitigation required by other Federal or state programs may, but will not necessarily, satisfy the Clean Water Act mitigation requirement.

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 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.

AUTHORIZATION CRITERIA

The District will review each application for compliance with the LOP-05-MN 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-05-MN and the Section 404(b)(1) guidelines, provided the District determines that the proposed work is not contrary to the 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 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 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.

DEFINITIONS.

Calculation of Aquatic Impact Thresholds: When calculating threshold limits for the categories of activities eligible for LOP authorization, impacts shall be determined by calculating the 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.

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

OTHER INFORMATION

1. **FEDERAL TRUST RESPONSIBILITY TO INDIAN TRIBES**. Projects that the District finds to have the potential to affect tribal interests will be coordinated with the appropriate Indian Tribal governments. The Tribe's views and the Federal trust responsibility will be considered in the District's evaluation. Throughout the state, including the treaty-ceded territories, the District review of all LOP projects which impact more than 10,000 square feet of wetland/water area will include coordination with any potentially affected tribe(s). The District will provide, by facsimile transmission, project notifications to the concerned tribe(s) for a 30-day review period. The views of the tribe(s) will be considered in the District's evaluation of the activity and in the District's determination of whether the activity or operation may impinge or abrogate treaty rights, including, but not limited to, reserved treaty fishing and hunting rights.

2. **PROJECT-SPECIFIC LOP-05-MN 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.

3. **FORM AND CONFIRMATION OF AUTHORIZATION**. Every LOP-05-MN authorization will be confirmed in writing by the St. Paul District via a letter of authorization to the project Applicant or authorized agent. The letter will identify any required special conditions.

4. **FEDERAL AND STATE ENDANGERED SPECIES AND CULTURAL RESOURCES**. LOP-05-MN 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.

5. **GRANDFATHER PROVISION**. Regulated work for activities authorized under the LOP provisions of GP/LOP-98-MN continues to be authorized under the terms of the original authorization. Authorized work must be completed within 5 years of the project authorization unless otherwise stated in the authorization.

6. **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.

7. **State Section 401 Certification.** The Minnesota Pollution Control Agency (MPCA) has waived water quality certification for authorizations under LOP-05-MN. The MPCA has not waived your responsibility to comply with the water quality standards contained in Minn. R. 7050 and other applicable MPCA statutes and rules.

GENERAL CONDITIONS

1. The time limit for completing work authorized by an LOP 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.

2. 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.

3. 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 in the National Register of Historic Places.

4. 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-05-MN authorization. A copy of the certification will be attached to the LOP-05-MN authorization if it contains such conditions.

5. 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-05-MN.

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 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.

STANDARD CONDITIONS

1. Suitable fill material. No dredged or fill material discharged under this authorization may consist of unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.,) and material discharged must be free from toxic pollutants in other than trace quantities.

2. Erosion control. Appropriate erosion control measures must be used and maintained in effective operating condition during construction and upon completion of operations all exposed slopes, fills, and disturbed areas, as well as any work below the ordinary high water mark must be given sufficient protection by appropriate means to prevent subsequent erosion. Work should be done in accordance with state-approved, published practices, such as defined in the Minnesota Pollution Control Agency Document, PROTECTING WATER QUALITY IN URBAN AREAS - BEST MANAGEMENT PRACTICES FOR MINNESOTA.

DEPARTMENT OF THE ARMY
ST. PAUL DISTRICT, CORPS OF ENGINEERS
SIBLEY SQUARE AT MEARS PARK
190 5TH ST. EAST STE 401
ST. PAUL, MINNESOTA 55101-1638

OFFICIAL BUSINESS
OPERATIONS - REGULATORY

POSTMASTER: Please Post Until Notice Expires