KY ASSOCIATION OF MITIGATION MANAGERS
2019 CONFERENCE
U.S. ARMY CORPS OF ENGINEERS, LOUISVILLE DISTRICT

September 18, 2019
Lake Barkley State Resort Park, Cadiz, KY

“The views, opinions and findings contained in this report are those of the author(s) and should not be construed as an official Department of the Army position, policy or decision, unless so designated by other official documentation.”
AFTER THE STORM – CORPS 404 PERMITTING

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A PORTION OF UNPROTECTED AREAS IN LOUISVILLE, KENTUCKY, AT HEIGHT OF 1937 FLOOD, WITH JEFFERSONVILLE AND CLARKSVILLE, INDIANA, IN BACKGROUND.
While the river has usually been Paducah’s best friend, flood waters turned it into the community’s enemy in 1884, 1913, and again in 1937. The area’s most devastating event of the twentieth century was the flood of 1937 when 90% of Paducah was covered with flood waters. Over 27,000 residents were evacuated. After six weeks of rain in the Ohio River Valley, the river crested at 60.8 feet, nearly 11 feet above the elevation of this present sidewalk. National Geographic featured a photo of a cow on the second story porch of a Lower Town neighborhood home. Following the flood, a 12.5 mile flood wall was erected to protect the city. (From flood photographs)

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LOUISVILLE, KENTUCKY

EXTENT OF INUNDATION OF A PORTION OF "DOWNTOWN" SECTION OF CITY DURING JANUARY AND FEBRUARY 1937 FLOOD.

(NOTE FEDERAL BUILDING UPPER CENTER)

LOUISVILLE DISTRICT, OHIO RIVER DIVISION.

27 JANUARY 1937

FILE NO. 3743
WAR DEPARTMENT
U. S. ENGINEER OFFICE
LOUISVILLE DISTRICT
Paducah Flood Protection Project (Section B - Unit II) - Ohio River. For protection of Paducah, Ky.
General view upstream from International Shoe Company building at foot of Jefferson Street.
LOUISVILLE DISTRICT, CORPS OF ENGINEERS, U. S. ARMY.

Exterior of the Louisville District exhibition tent at the Kentucky State Fair, 5th to 13th September 1952. Exhibit attendance 10,000.
Louisville District "Penny Arcade" display at Mississippi Valley Improvement Association Convention held at St. Louis, Missouri, 12th and 13th February 1951. Attendance 300.
LEGAL AUTHORITY/JURISDICTION

Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403)

- Regulates the placement of any **structure** or **work** in, under, or over **Navigable Waters of the U.S.**

**Structure or Work**: Utility lines, outfalls, marinas, barge mooring facilities, boat docks, dredging, rip rap, etc.

**Navigable Waters of the U.S.**: Waters currently used, used in the past, or susceptible for use in the transport of interstate or foreign commerce, including waters subject to the ebb and flow of the tide.
LEGAL AUTHORITY/JURISDICTION

Section 404 of the Clean Water Act (33 U.S.C. 1344)

- Regulates the *discharge* of *dredged* or *fill material* into *waters* of the U.S. (WOUS)
  - Dredged Material - Excavated or dredged from WOUS
  - Fill Material - Material placed in WOUS where the material has the effect of *replacing any portion of a WOUS with dry land* or *changing the bottom elevation* of any portion of a WOUS.
  - Waters of the U.S. – Includes tributaries and wetlands adjacent to other waters of the U.S. (33 CFR 328)
Note: Lack of designation as a “blue line” or named stream on USGS topo does not determine absence of Corps jurisdiction.
TYPES OF DEPARTMENT OF THE ARMY (DA) PERMITS

Individual Permits

- Standard Permits
  - Project-specific evaluation and authorization
  - Process involves public notice, public comment period, hearings as required
- Letters of Permission
  - Less controversial than SPs
  - Minor impacts, coordinate with agencies/neighbors (no public notice)

General Permits

- Nationwide Permits
- Regional General Permits
  - Similar activities resulting in minimal effects; valid for 5 years

Emergency Procedures

- Division Engineer authorized to approve special processing procedures
PERMITTING - OTHER PROGRAM REQUIREMENTS

National Environmental Policy Act
Section 401 CWA
Section 7 of the Endangered Species Act
Section 106 of the National Historic Preservation Act
33 CFR § 323.4(a)(1)(iii)(C)(1)(iv)

The discharges of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not promptly removed, would result in damage to or loss of existing crops or would impair or prevent the plowing, seeding, harvesting or cultivating of crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within one year of discovery of such blockages in order to be eligible for exemption.
33 CFR § 323.4 - Discharges not requiring permits.

33 CFR § 323.4(a)(2)

Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope, or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.
33 CFR § 325.2 – Processing of applications.

33 CFR § 325.2(e)(4)

Emergency procedures. Division engineers are authorized to approve special processing procedures in emergency situations. An “emergency” is a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures. In emergency situations, the district engineer will explain the circumstances and recommend special procedures to the division engineer who will instruct the district engineer as to further processing of the application. Even in an emergency situation, reasonable efforts will be made to receive comments from interested Federal, state, and local agencies and the affected public. Also, notice of any special procedures authorized and their rationale is to be appropriately published as soon as practicable.
NATIONWIDE PERMIT (NWP) OVERVIEW

- NWP 3 – Maintenance
- NWP 12 – Utility Line Activities
- NWP 13 – Bank Stabilization
- NWP 14 – Linear Transportation Projects
- NWP 19 – Minor Dredging
- NWP 20 – Response Operations for Oil or Hazardous Substances
- NWP 23 - Approved Categorical Exclusions
- NWP 37 – Emergency Watershed Protection and Rehabilitation
- NWP 45 – Repair of Uplands Damaged by Discrete Events
NATIONWIDE PERMIT (NWP) OVERVIEW

• NWP 3 – Maintenance

This NWP also authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the district engineer, provided the permittee can demonstrate funding, contract, or other similar delays.
NATIONWIDE PERMIT (NWP) OVERVIEW

• NWP 23 - Approved Categorical Exclusions

(a) The Natural Resources Conservation Service for a situation requiring immediate action under its emergency Watershed Protection Program (7 CFR part 624);

(d) The Office of Surface Mining, or states with approved programs, for abandoned mine land reclamation activities under Title IV of the Surface Mining Control and Reclamation Act (30 CFR subchapter R), where the activity does not involve coal extraction; or

(e) The Farm Service Agency under its Emergency Conservation Program (7 CFR part 701).
PCN requirements are provided in three places (must check all three):

1. Specific NWP to be used
2. General Conditions of all NWPs
   (e.g. General Condition # 18 and #20)
3. LRL Regional Conditions for NWPs
COMPLIANCE – DA PERMIT CONDITIONS

- **General Conditions:** Apply to all permits (suitable material, no flooding, fish passage)
- **Regional Conditions:** Apply to NWPs, supplemental
- **Special Conditions:** Apply to NWPs & IPs; project specific: could relate to ESA, mitigation, construction requirements, etc.

- The permittee shall adhere to the stream and wetland mitigation plans as outlined in Revision 6 of the DA application package.
- The permittee shall submit a final planting list for Corps approval prior to planting.
- The permittee shall permanently protect the mitigation area through the implementation of the Corps-approved deed restriction. A copy of the signed and recorded deed restriction for the mitigation area shall be submitted to the Corps within 60 days of permit issuance.
- The permittee is restricted from completing any tree clearing activities from April 1 – September 30. To complete clearing activities during the restriction dates, the permittee must receive prior approval from the Corps. If such a request is made, the permittee shall provide documentation from a qualified person demonstrating that there is no potential roosting habitat that would be affected by the proposed activity. The supporting documentation shall be submitted to the Corps and the United States Fish and Wildlife Service for review.
COMPLIANCE WITH CORPS’ PERMITS: TIPS FOR MINIMIZING COMPLIANCE ISSUES

- Read and understand the permit (GCs, SCs & RCs)
- Provide contractors a copy of permit and permit drawings
- Construct what is authorized
- Call Corps prior to changes and when issues are discovered
- Implement & maintain EPSC BMPs
POTENTIAL CONSEQUENCES OF PERMIT NON-COMPLIANCE

Administrative/construction costs associated with remedial activities to bring the site into compliance

Permit Suspension/Revocation
Administrative Penalties (33 CFR 326)

Civil/Criminal Litigation (Corps referral to DOJ)
UNAUTHORIZED ACTIVITIES

Placement or redistribution of fill or dredged material into “waters of the U.S.” without authorization or exemption.
POTENTIAL CONSEQUENCES OF CONDUCTING UNAUTHORIZED ACTIVITIES

Administrative/construction costs associated with any required restoration activities
Cease and Desist Order for unauthorized activity may delay project
Injunctions: 33 U.S.C. 1319
Civil Penalties: 33 U.S.C. 1319
Criminal Penalties: 33 U.S.C. 1319
MORE INFORMATION

Louisville District Website: https://www.lrl.usace.army.mil/Missions/Regulatory/

Corps Headquarters Website: https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/