



**DEPARTMENT OF THE ARMY (DA)
BUFFALO DISTRICT,
UNITED STATES ARMY CORPS OF ENGINEERS (USACE)**

LETTER OF PERMISSION (LOP) PROCEDURES

Final LOP Procedures Approved on September 13, 2013

Section 404 of the Clean Water Act (CWA) (33 USC 1344) and/or Section 10 of the Rivers and Harbors Act (RHA) of 1899 (33 U.S.C. 403).

LOCATION OF WORK:

These LOP procedures shall apply to work in all waters of the United States (WOUS) that are located within the State of New York and subject to regulation by the USACE Buffalo District.

ACTIVITIES COVERED:

Categories of Activities eligible for LOP authorization include the following, subject to the General and Special Conditions and requirements noted below, and any Special Conditions added by USACE upon project specific review:

Category 1: THE DISCHARGE OF DREDGED OR FILL MATERIAL CAUSING THE LOSS OF UP TO 1.0 ACRE OF WOUS AND THE LOSS OF NO MORE THAN 500 LINEAR FEET OF STREAM CHANNEL ASSOCIATED WITH THE CONSTRUCTION OF RESIDENTIAL, COMMERCIAL, INSTITUTIONAL OR INDUSTRIAL DEVELOPMENTS.

- Authorization will be limited to projects that include appropriate compensatory mitigation and which have been determined to represent the least environmentally damaging practicable alternative according to CWA 404(b)(1) guidelines.
- Culverted stream crossing activities will be conducted according to guidelines outlined in Appendix A- Culvert Installation Requirements, unless criteria are waived by the USACE.

Category 2: PLACEMENT OF A MAXIMUM OF 2000 CUBIC YARDS OF SAND INTO OPEN WATERS TO MAINTAIN AND RESTORE BATHING BEACHES.

- Authorization shall be limited to projects involving a maximum of 2000 cubic yards of beach-compatible sand placed below ordinary high water (OHW).
- Sand material is to be obtained from an upland source or suitable dredged material meeting grain size requirements outlined in the USEPA/USACE Great Lakes Dredged Material Testing and Evaluation Manual (<http://www.epa.gov/glnpo/sediment/gltem/404main.pdf>).
- The dredged material must be free from chemical, biological, or other pollutants.

- Placement may not occur within or be associated with activities occurring in wetlands as defined in Title 33 CFR Part 320 et. seq. or other special aquatic sites which are defined in Title 40 of the CFR Part 230.
- Note: Any dredging activities will require a separate permit authorization.

Category 3: PLACEMENT OF NO MORE THAN 10,000 CUBIC YARDS OF PREDOMINANTLY GRANULAR DREDGED MATERIAL INTO NEARSHORE AREAS OF THE NIAGARA AND ST. LAWRENCE RIVERS, AND LAKES ERIE AND ONTARIO, LOCATED WITHIN THE STATE OF NEW YORK TO MAINTAIN THE LITTORAL SYSTEM.

- Suitability of the dredged material and any testing requirements will be determined through coordination with the USACE Project Manager (PM).
- If testing of the dredged material is required, the dredged material must be sampled, tested, and evaluated in accordance with the USEPA/USACE Great Lakes Dredged Material Testing and Evaluation Manual (<http://www.epa.gov/glnpo/sediment/gltem/404main.pdf>) to determine if the material meets federal guidelines for near shore placement.
- If testing of the coarse-grain dredged material is determined as necessary, surface grab samples are acceptable to represent characteristics of the dredged material - if the material has been dredged within the last five years and/or constitutes a shoal that is less than two feet above the proposed dredging elevation as defined in Title 40 CFR 230.11(d).
- The dredged material must be free from chemical, biological, or other pollutants.
- These discharges may not occur within or be associated with activities occurring in wetlands as defined in Title 33 CFR Part 320 et. seq. or other special aquatic sites which are defined in Title 40 of the CFR Part 230.
- Note: Any dredging activities will require a separate permit authorization.

Category 4: DISCHARGE OF DREDGED MATERIAL INTO USACE APPROVED OPEN LAKE PLACEMENT AREAS IN LAKES ERIE AND ONTARIO LOCATED WITHIN THE STATE OF NEW YORK.

- Note: Any dredging activities will require a separate permit authorization.
- Suitability of the dredged material and any testing requirements will be determined through coordination with the USACE Project Manager (PM).
- If testing of the dredged material is required, the dredged material must be sampled, tested, and evaluated in accordance with the USEPA/USACE Great Lakes Dredged Material Testing and Evaluation Manual (<http://www.epa.gov/glnpo/sediment/gltem/404main.pdf>) to determine if the material meets federal guidelines for open-lake placement.

- The current placement areas available for use under LOP procedures are at the following locations:

Lake Ontario Open Lake Placement Areas* offshore from:

Wilson Harbor, NY
Olcott Harbor, NY
Rochester Harbor/Irondequoit Bay, NY
Great Sodus Bay, NY
Little Sodus Bay, NY
Oswego, NY

Lake Erie Open Lake Placement Areas* offshore from:

Barcelona
Dunkirk

*Note: This list is for current placement areas only. Any areas approved in the future for USACE dredge placement would also be eligible for public use under the proposed LOP procedures if a 401 WQC is issued by the New York State Department of Environmental Conservation (NYSDEC).

The following Special Conditions shall be placed upon all permits issued under Category 4 Activities (Open Lake Placement): Note that additional Special Conditions may be added following project specific review.

1. Prior to any contractor's use of an Open Lake Placement Area, you must obtain instructions from the Operations and Technical Support Section regarding the Area's location and method of dredged material placement. Contact the Operations and Technical Support Section representative at:

David Swiatek
Operations and Technical Support Section
U.S. Army Engineer District, Buffalo
1776 Niagara Street
Buffalo, New York 14207-3199
716-879-4371
David.m.swiatek@usace.army.mil

2. The Permittee, or its contractor, must have a copy of this LOP on the vessel used for the authorized transportation and disposal of dredged material to the Open Lake Placement Area.
3. The Permittee shall perform the work authorized by this LOP in such a way that it will not interfere with any scheduled or ongoing maintenance activity conducted by the Federal Government. Information regarding the scheduling of Federal maintenance projects may be obtained by contacting the Operations and Technical Support Section as noted above.
4. The Permittee shall take all precautions necessary to prevent any dredged material, or water containing dredged material, to be spilled or otherwise discharged from the barge or other hauling equipment, including dump trucks if by land, en route to or from the Open Lake Placement Area.

Definitions:**1. Special Aquatic Site:**

- Wetlands, mudflats, vegetated shallows, coral reefs, riffle and pool complexes as defined at 40 CFR 230.40 through 230.45.
- These are geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values.
- These areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region.

2. Waters of the United States (WOUS):

- All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- All interstate waters including interstate wetlands;
- All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - Which are used or could be used for industrial purposes by industries in interstate commerce;
- All impoundments of waters otherwise defined as WOUS under this definition;
- Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;
- The territorial sea;
- Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not WOUS. (see 33 CFR 328.3(b))

3. USEPA Guidelines at Section 404(b)(1) 40 CFR Part 230.10.:

- These Guidelines are a set of regulations written by the USEPA and administered by the USACE in the USACE regulatory permit program. The USACE uses the Guidelines in the evaluation of proposed impacts of a project on jurisdictional WOUS.

General Notes Regarding All Categories of Activities:

- Impacts to WOUS shall be avoided or minimized through the use of practicable alternatives.
- Appropriate compensatory mitigation for unavoidable adverse impacts to WOUS shall be required.
- Work that would have substantial adverse impacts on the aquatic environment or cause a substantial reduction in the reach of WOUS is not included within these proposed categories of activities.
- Note: Impacts to special aquatic sites are strictly prohibited under Categories 2 and 3.
- All projects must be single and complete projects.
- All projects that do not meet the criteria listed above, and are not authorized under NWP or RPs, will be reviewed as a Standard Permit (SP).
- Note the USACE has discretionary authority over all permit actions and can elevate a permit request to require the SP process at any time based on concerns for the aquatic environment, or for any other factor pertaining to the public interest.

Other Required Authorizations:

- This LOP would not supersede any state or local governmental authorities, and any such approvals must be obtained in order for this LOP authorization to be valid.
- All projects undertaken under the proposed categories of activities located within the New York Coastal Area must receive concurrence that the project is consistent with the New York Coastal Management Program (per Section 307(c) of the Coastal Zone Management Act of 1972, as amended) from the New York State Department of State (NYS DOS) prior to issuance of a valid DA permit.
- All projects undertaken under the proposed categories of activities must obtain WQC (per Section 401(a)(1) of the Federal CWA (33 U.S.C. Sec. 1341)) from the NYS DEC prior to the issuance of a valid DA permit.

APPLICATION PROCEDURES:

An application for authorization of work under this LOP procedure must use the New York State/USACE Joint Application Form (JAF). The JAF must be completed and signed and include a written description of the entire project, proposed work schedule, and the address and telephone number of a point of contact who can be reached during working hours. The application must include but is not limited to, the following information, as applicable:

1. Name and address of adjacent property owner(s).
2. Location Map – preferably depicted on a USGS 7.5 minute topographical map. The map shall include a north arrow, property/project boundary (not a star or arrow pointing to an unspecified area of land) and adjacent roads and highways to enable orientation/direction.
3. Project Drawings
 - Provide all plan view (as if viewed from overhead) maps and drawings on 8 ½ x 11-inch black-and-white topographic base map (color aerial maps are convenient for in-house review, but are not acceptable for the permanent recordkeeping). All information, including text, must be clearly labeled in legibly reproducible 8 ½ x 11-inch plan sheets.
 - Plan sheets shall indicate the vertical datum (e.g. IGLD 1985, NGVD 1929, etc.) equivalent for the project's vertical datum (OHW, mean low water (MLW) or other tidal datum for tidal projects within the vertical units.
 - Provide typical cross-section views of all wetland and stream (ephemeral, intermittent, perennial) fill areas on 8 ½ x 11-inch black-and-white maps; include size and description of project area. Include maps or drawings showing the area and the lineal extent of the project, and a description of pre- construction conditions and photographs coordinated to a photo key.
4. Project Description - a detailed project description; project purpose and need for the project; direct and indirect effects the project could potentially cause to the aquatic resource, endangered species, historic and cultural resources; calculated impact(s) in acres/cubic yards/linear feet of all permanent and temporary fills and excavations occurring in WOUS.
5. Description of any current and/or historic land uses on the site.
6. Identify any past permitted activities on the project site, including a description and Permit Number.
7. Endangered Species: The application must include:
 - a written statement indicating if any federally listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat.
 - The name(s) of each threatened and endangered (T&E) species that might be affected by the proposed work or that may utilize the critical habitat that may be affected by the proposed work.
 - Requests for information regarding the presence of T&E species should be directed to the United States Fish and Wildlife Service (USFWS).

- The application must include a copy of any correspondence from the USFWS regarding the presence of T&E species or evidence that the applicant has utilized the USFWS T&E website: <http://www.fws.gov/northeast/nyfo/es/section7.htm>. Website evidence shall include a county list of T&E species.
- For projects located in counties containing T&E species, the application shall also include a discussion of potential T&E habitat within the project site. If there is potential habitat for any federally listed species within the project site you must provide:
 - results of any habitat surveys and presence/absence surveys. All surveys should be coordinated with the USFWS prior to initiation.
 - detailed description of the proposed project, including approximate proposed project construction schedule and project activities (e.g., land clearing, utilities, stormwater management).
 - description of the natural characteristics of the property and surrounding area (e.g., forested areas, freshwater wetlands, open waters, and soils). Additionally, please include a description of surrounding land use (residential, agricultural, or commercial).
 - description of the area to be impacted by the proposed project, including the species and number or acres of trees to be removed.
 - location of the above referenced property and extent of any project related activities or discharges clearly indicated on a copy of a USGS 7.5 Minute Topographic Quadrangle (Quad) with the name of the Quad(s) and latitude/longitude clearly labeled.
 - description of conservation measures to avoid or minimize impacts to listed species.
- Federal applicants must submit the appropriate documentation regarding the project's compliance with the ESA.

8. Cultural Resources: The application must include:

- A statement indicating if the proposed activity may affect a historic property listed in, determined to be eligible for listing in, or potentially eligible for listing in, the National Register of Historic Places.
- A statement of which historic property may be affected by the proposed work or include a map indicating the location of the historic property.
- A copy of any completed survey reports.
- If a survey has not been performed the application shall include a statement listing resources checked in making the determination.
- Copies of any available correspondence from New York State Office of Parks, Recreation, and Historic Preservation (NYSOPRHP) regarding historic properties. Information regarding cultural resources may be found at: <http://nysparks.state.ny.us/shpo/index.htm>.

- Assistance regarding the determination of the presence of cultural resources at or near the project site should be directed to SHPO.
 - Federal applicants must submit the appropriate documentation regarding the project's compliance with SHPO.
9. Nationwide Rivers Inventory: The application shall indicate:
- If a river segment listed within the National Park Service Nationwide Rivers Inventory (NRI) is located within the proposed project area.
 - For project areas containing a listed NRI segment, the application shall also include a statement as to how adverse effects to the river have been avoided or mitigated.
 - The NRI list is available at: <http://www.nps.gov/ncrc/programs/rtca/nri/states/ny.html>

Category 1 Only:

10. For projects that involve the installation or rehabilitation of culverts, please see Appendix A for additional application requirements.
11. For projects proposing wetland and/or stream impacts, you must submit a Delineation Report in accordance with the 1987 USACE Wetland Delineation Manual and the appropriate Regional Supplement, which includes the information described in Appendix B.
12. A Wetland Delineation survey map which includes the following:
- Title block, including drawing date, scale, revision dates, north arrow, existing topographic contours (if available), benchmarks, and the stamp of a licensed surveyor or a narrative describing how the GPS data were obtained
 - Boundary lines of the parcel, AND of the project site, clearly marked with the acres shown on the drawing
 - Delineation flags shown as points that are connected by straight lines (or extend off-site at parcel boundaries), identified on the drawing with the corresponding number and/or letter that is written on the flag in the field. The flag numbers and any text must occur in large enough scale to be legible on an 8 ½ x 11-inch reduced drawing map.
 - Appropriate hatching, shading, and/or standard symbols to identify the extent of WOUS (ephemeral, intermittent, perennial streams), ditches, swales, and conveyances and all wetlands, including any proposed as isolated/non-jurisdictional areas.
 - All identified features shall be labeled clearly, identifying each as Wetland 1 or Wetland A, Stream 1, Ditch 1, etc.

13. A drawing/map depicting all proposed aquatic impacts shall be presented as a separate document including the following:

- Flagged, and legibly labeled (at 8 ½ x 11, black and white) surveyed boundary/reach of each wetland and stream.
- Unique hatching depicting each impact to each aquatic resource with the acreage/linear feet labeled.

14. All information pertaining to proposed impacts shall be summarized in a table that depicts the following in a separate column for each item listed below. This table should also appear on the Proposed Impacts Map.

- Wetland/Stream Name (Wetland A; Stream 1, e.g.)
- Wetland type (emergent, scrub/shrub, forested)
- Stream type (ephemeral/headwater, intermittent, perennial)
- Stream order
- Total wetland acreage of each wetland
- Proposed acreage of wetland impact for each wetland
- Stream lineal feet and width for each stream
- Proposed lineal feet of impact for each stream
- Wetland - jurisdictional/non-jurisdictional

15. Completion of the Aquatic Resources Upload Sheet in electronic format may be requested for projects having multiple WOUS. This Sheet may be found at <http://www.lrb.usace.army.mil/Missions/Regulatory/ApplicationForms.aspx>.

16. The JAF shall include a narrative describing avoidance and minimization efforts. All permits authorized/issued by the USACE must reflect the least environmentally damaging practicable alternative as described in the USEPA 404(b)(1) Guidelines. Include any plan maps that show the “evolution” of the proposed plan to the current alternative and discuss how the proposed project represents the least environmentally damaging practicable alternative.

17. Any application requesting DA authorization to fill more than 0.10 acre of jurisdictional WOUS must include a compensatory mitigation plan proposal that satisfies the requirements outlined in 33 CFR 332, “Compensatory Mitigation for Losses of Aquatic Resources; Final Rule”, dated April 10, 2008 (33 CFR 325 & 332). Available at http://www.usace.army.mil/cw/cecwo/reg/news/final_mitig_rule.pdf

Categories 2-4 Only:

18. Volume of dredged material proposed for removal from AND placement into WOUS, expressed in cubic yards.

19. Narrative describing the evaluation procedures utilized to determine if testing of the dredged material was required.

20. Results and interpretation of testing results using the thresholds set forth in the USEPA/USACE Great Lakes Dredged Material Testing and Evaluation Manual (<http://www.epa.gov/glnpo/sediment/gltem/404main.pdf>).

21. Name, address, and telephone number of the testing lab.

Testing requirements pertaining to Categories 2, 3, and 4 are in accordance with United States Environmental Protection Agency (USEPA) Guidelines for Specification of Placement Sites for Dredged or Fill Material (40 CFR 230.60 [a] and [b]) as follows:

230.60 General evaluation of dredged or fill material:

The purpose of these evaluation procedures and the chemical and biological testing sequence outlined in Section 230.61 is to provide information to reach the determinations required by Section 230.11. Results of prior evaluations, chemical and biological tests, scientific research, and experience should be utilized when such information is beneficial in making a determination. Such prior results may make new testing unnecessary. The information used shall be documented. Where the same information applies to more than one determination, it may be documented once and referenced in later determinations.

(a) If the evaluation under paragraph (b) indicates the dredged or fill material is not a carrier of contaminants, then the required determinations pertaining to the presence and effects of contaminants can be made without testing. Dredged or fill material is most likely to be free from chemical, biological, or other pollutants when it is composed primarily of sand, gravel, or other naturally occurring inert material. Dredged material so composed is generally found in areas of high current or wave energy such as streams with large bed loads or coastal areas with shifting bars and channels. However, when such material is discolored or contains other indications that contaminants may be present, further inquiry should be made.

(b) The extraction site shall be examined in order to assess if it is sufficiently removed from sources of pollution to provide reasonable assurance that the proposed discharge material is not a carrier of contaminants. Factors to be considered include, but are not limited to:

(1) Potential routes of contaminants or contaminated sediments to the extraction site, based on hydrographic or other maps, aerial photography, or other materials that show watercourses, surface relief, proximity to tidal movement, private and public roads, location of buildings, municipal and industrial areas, and agricultural or forest lands.

(2) Pertinent results from tests previously carried out on the material at the extraction site, or carried out on similar material for other permitted projects in the vicinity. Materials shall be considered similar if the sources of contamination, physical configuration of the sites, and sediment composition of the materials are comparable, in light of water circulation and stratification, sediment accumulation and general sediment characteristics. Tests from other sites may be relied on only if no changes have occurred at the extraction sites to render the results irrelevant.

(3) Any potential for significant introduction of persistent pesticides from land runoff or percolation;

(4) Any records of spills or disposal of petroleum products or substances designated as hazardous under Section 311 of the CWA (See 40 CFR part 116);

(5) Information in federal, state and local records indicating significant introduction of pollutants from industries, municipalities, or other sources, including types and amounts of waste materials discharged along the potential routes of contaminants to the extraction site; and

(6) Any possibility of the presence of substantial natural deposits of minerals or other substances which could be released to the aquatic environment in harmful quantities by man-induced discharge activities.

These testing exclusions are referenced and discussed in Chapter 3, Paragraph 3.4 of the 1998 USEPA/USACE Great Lakes Dredged Material Testing and Evaluation Manual <http://www.epa.gov/glnpo/sediment/gltem/404main.pdf>.

EVALUATION PROCEDURES:

The USACE procedures for authorizing these activities under Section 404 LOP, following receipt of a complete application as described above, are as follows:

1. A cover letter describing the proposed work and a copy of the applicant's drawings will be provided to the USFWS, USEPA and NYSDEC. The notification will also be provided to other parties, such as the United States Coast Guard (USCG), NYSDOS, NYSOPRHP, the National Park Service (NPS) and directly adjoining property owners, as appropriate.
2. These parties have 15 days from the date of the cover letter to provide comments and recommendations regarding the work proposed for authorization. Time extensions may be granted to respondents at the discretion of the USACE PM. Federal or state resource agency comments must be clearly identified and reflect a concern related to the aquatic environment within their area of expertise; state the species or resources that could be impacted by the activities and describe the impacts that either individually or cumulatively will be more than minimal. If a federal or state resource agency expresses a concern requesting the USACE to require a SP, comments must be submitted in writing prior to the close of the comment period.
3. Comments/recommendations received will be discussed with the applicant, if appropriate, to ensure that the applicant is willing and able to comply with any recommendations that are incorporated into the permit as Special Conditions. If concerns related to the aquatic environment with the requesting agencies area of expertise cannot be resolved by the applicant, the USACE may process the application under the SP process.
4. Before issuing the LOP, the USACE PM will confirm issuance of the NYSDEC WQC and New York State Department of State (NYSDOS) Coastal Management Program Consistency Concurrence (CZM) (if required) and ensure that any required coordination with the USFWS and SHPO has been completed.
5. If it is determined that it is appropriate to authorize the work by LOP, evaluation of the application shall be completed. In addition to the Special Conditions listed with each category, additional Special Conditions that the USACE PM determines are appropriate shall be added to the permit.
6. Work may not proceed prior to written notification that the District Engineer has issued a LOP. It is the applicant's responsibility to ensure that the authorized project meets the terms and conditions set forth in the LOP. Failure to abide by the terms and conditions will constitute a violation of the CWA and/or the RHA.

GENERAL CONDITIONS:

Congressional Authorities:

- () Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403).
- () Section 404 of the Clean Water Act (33 U.S.C. 1344).

1. Permit Expiration & Time Extension Requests: The time limit for completing the work authorized ends on _____. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least one month before the above expiration date. (Note: a time extension cannot be issued if it is received by this office after the above expiration date.) Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, the USACE will normally give favorable consideration to a request for an extension of this time limit.

2. Proper Maintenance & Abandonment: You must maintain the structure/fill authorized by this LOP in good condition and in conformance with the terms and conditions of this LOP to ensure public safety. You are not relieved of this requirement unless you transfer to a third party in compliance with General Condition 3 below. Should you wish to cease maintenance of, or abandon the authorized activity, without transferring the permit, you must apply for a LOP modification from this office, which may require restoration of the area to the original condition.

3. Permit Transfer: If you sell the property associated with this LOP, you must obtain the signature of the new owner in the space provided on the last page of this permit. A copy of the signed permit must be submitted to this office to validate transfer of permit authorization.

4. Reevaluation of Permit Decision: This office may reevaluate its decision on this LOP 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 LOP.
- b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate.
- 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.

5. 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.

- 6. Cultural Resources:** All work must be stopped immediately if any historic or archeological remains are discovered while conducting work authorized by the LOP. The permittee must notify the USACE Project Manager within 24 hours of initial discovery so that any required coordination under the NHPA can be determined. Further, should human remains be encountered during any phase of the proposed project, such person or persons encountering the human remains must immediately cease work and must not disturb or remove the remains, must protect the exposed portions of the remains from inclement weather and vandalism, and immediately notify the permittee. Within 24 hours, the permittee must notify the USACE Project Manager and the New York State Office of Parks, Recreation, and Historic Preservation, Peebles Island State Park, P.O. Box 189, Waterford, New York 12188-0189.
- 7. Future Federal Actions:** The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration of the structure or work herein 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 USACE, 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 as a result of any such removal or alteration.
- 8. Aquatic Life Movements:** No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species.
- 9. Management of Water Flows:** To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization and storm water management activities. The activity must be constructed to withstand expected high flows and must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound or manage high flows. The activity may alter the pre-construction watercourse, condition, capacity, and location of open waters if it benefits the aquatic environment (e.g., stream restoration or relocation activities).
- 10. Suitable Material:** No activity may involve unsuitable material, which includes, but is not limited to chemical or hazardous waste, trash, debris, car bodies, asphalt, etc. Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act (CWA)). If there is a question as to whether the material is unsuitable, the USACE Buffalo District should be contacted and must authorize prior to the commencement of the activity.
- 11. Floodplains:** The activity must comply with any applicable Federal Emergency Management Act (FEMA) approved state or local floodplain management requirements.
- 12. Equipment:** Heavy equipment working in wetlands or mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance. All appropriate measures must be taken to minimize soil disturbance, including, but not limited to, the placement of heavy equipment in wetlands or mudflats on mats.

13. Soil Erosion and Sediment Controls: Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water (OHW) mark must be permanently stabilized at the earliest practicable date. To the maximum extent practicable, activities within WOUS authorized under this LOP will be performed during periods of low-flow or no-flow.

14. Removal of Temporary Fills: Authorized temporary fills must be removed in their entirety and the affected areas returned to their pre-construction elevations. The affected areas must be revegetated, as appropriate. All temporary fills as shown on Sheet ___ of ___ will be removed by ___.

15. Limits of this Authorization:

- a. This permit does not obviate the need to obtain other Federal, state, or local authorizations required by law.
- b. This permit does not grant any property rights or exclusive privileges.
- c. This permit does not authorize any injury to the property or rights of others.
- d. This permit does not authorize interference with any existing or proposed Federal project.

16. Minimal Effects: Projects authorized by this LOP shall have minimal individual and cumulative adverse environmental impacts as determined by the USACE.

17. National Lands: Activities authorized by this LOP shall not impinge upon the value of any National Wildlife Refuge, National Forest, or any other area administered by the USFWS or NPS. This category includes existing mitigation and wetland mitigation banking sites.

18. Federal Liability: In issuing this LOP, the USACE does not assume any liability for 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 LOP.
- d. Design or construction deficiencies associated with the permitted work.
- e. Damage claims associated with any future modification, suspension, or revocation of this LOP.

19. Environmental Values: The Permittee shall make every reasonable effort to carry out the construction or operation of the work authorized herein in a manner so as to maintain as much as is practicable, and to minimize any adverse impacts on, existing fish, wildlife, and natural environmental values, and discourage the establishment or spread of plant species identified as non-native invasive species by any federal or state agency.

20. Inspections: The Permittee shall permit the USACE or authorized representative(s) to make periodic inspections at any time deemed necessary in order to ensure that the work is being performed in accordance with the terms and conditions of this LOP. The USACE may also require post-construction engineering drawings for completed work, and post-dredging survey drawings for any dredging work.

21. Modification, Suspension, and Revocation: This LOP may be modified, suspended, or revoked in whole or in part pursuant to the policies and procedures of 33 CFR 325.7; and any such action shall not be the basis for any claim for damages against the United States.

22. Restoration: The Permittee, upon receipt of a notice of revocation of authorization under this LOP, may be required to restore the wetland or waterway to its former condition as directed by the USACE. Non-compliance with this notice would result in the pursuit of further enforcement action by the USACE.

23. Previously Authorized Activities: This LOP does not affect any prior determinations made by the USACE.

24. Migratory Birds and Bald and Golden Eagles: The Permittee is responsible for obtaining any "take" permits required under the USFWS regulations governing compliance with the Migratory Bird Treaty Act or the Bald and Golden Eagle Protection Act. The Permittee should contact the appropriate local office of the USFWS to determine if such "take" permits are required for a particular activity.

Note: Appendix A shall be amended to reflect any revised Regional Conditions pertaining to culvert installations contained in future re-issued Nationwide Permit Programs. The USACE will issue a Public Notice announcing any changes to Appendix A.

USACE 404 LETTER OF PERMISSION APPENDIX A: CULVERT INSTALLATION REQUIREMENTS

1. All new or replacement culverts shall be constructed/installed in accordance with the following in order to ensure compliance with LOP General Condition #8 – Aquatic Life Movement and #9 Management of Water Flows:

General Information:

A. Use of the following requirements and recommendations alone will not satisfy the need for proper engineering and design. In particular, appropriate engineering is required to ensure structures are sized and designed to provide adequate capacity (to pass various flood flows) and stability (bed, bed forms, footings and abutments).

B. Site specific information (i.e. stream bed slope, type and size of stream bed material, stream type, existing natural or manmade barriers, etc.) should be assessed to determine appropriate culvert design and to ensure management of water flows and aquatic life movement.

C. Before replacing a culvert or other crossing structure with a larger structure it is essential that the replacement be evaluated for its impacts on: downstream flooding, upstream and downstream habitat (in-stream habitat, wetlands); potential for erosion and headcutting, and stream stability.

D. Measures should be included in all culvert designs that will promote the safe passage of fish and other indigenous aquatic organisms.

E. The dimension, pattern, and profile of the stream above and below the stream crossing should not be permanently modified by changing the width or depth of the stream channel.

Application Requirements:

A. In order to comply with General Condition #8 Aquatic Life Movement, either a bottomless culvert or bridge must be used where practicable. If the stream cannot be spanned, the culvert must be installed with its bottom buried (embedded) below the grade of the stream bed where practicable. (Note: When not practicable to do so due to small culvert size, it is suitable to allow natural deposition to cover the interior of the culvert bed.)

- A minimum of three stream channel cross sections shall be taken at proximal locations to the crossing location to determine the average of the lowest points in elevation of the stream bed. This average low point shall be used to ensure low flow is maintained through the culvert and from which all embedment depths are measured.

- To ensure low flow and aquatic life movement is maintained, an embedment depth of a minimum of 20 percent of the culvert vertical rise throughout the length of the culvert is recommended. Additionally, it is recommended that the culvert bed slope remain consistent with the slope of the adjacent stream channel.

B. In order to comply with General Condition #9 Management of Water Flows, bank-full flows shall be accommodated through maintenance of the existing bank-full channel cross sectional dimensions within the culvert. Bank-full width is generally considered to be the top width at the stage where a stream begins to overtop its banks and spread into the floodplain.

- An average of three measurements (project location and straight sections of the stream upstream and downstream) shall be used to determine appropriate opening width. If the project is a replacement of an existing structure then only upstream and downstream locations shall be used to compute the average.
- To ensure bank-full flow is accommodated by the culvert, it is recommended that minimum culvert widths include a minimum of 1.25 times width of the stream channel at the ordinary high water or a 2 year design storm.

C. The application must include the following information:

- a note indicating which of the above requirements will not be met by the proposed project;
- information as to why the use of such structures or measures would not be practicable;
- a brief description of the stream discussing the items outlined in the above General Information section;
- the cross sections of the stream used to calculate the stream bed low point and bank-full width;
- an evaluation of the effects the crossing would have on aquatic life movement and/or water flows; and
- mitigation measures that will be employed to minimize these effects.

A waiver of the requirement(s) will be issued if it can be demonstrated that the proposal would result in the least environmentally damaging practicable alternative (e.g. compliance with any of the requirement(s) would result in detrimental impacts to the aquatic system).

2. All applications for Culvert Rehabilitation Projects which will involve pipe slip lining or other activities, including concrete invert paving and concrete lining projects shall include the following information in order to ensure compliance with LOP General Condition #8 – Aquatic Life Movement and #9 Management of Water Flows (Slip lining is defined as the insertion of a smaller diameter pipe into an existing pipe by pulling pushing, or spiral winding.):

- The applicant shall assess the existing culvert, prior to the proposed repair, for compliance with General Conditions #8 (Aquatic Life Movements) and #9 (Management of Water Flows) and provide a summary of the assessment including any impediments found to exist.
- Type of rehabilitation proposed (i.e. slip lining, concrete invert paving, concrete lining, cured-in-place pipe lining etc.).
- An evaluation of the proposed rehabilitation project and its effects upon aquatic life movements and low/ high flow conditions in order to show compliance with General Conditions #8 and #9.
- For those projects where an impediment is found or proposed to impede the movement of aquatic life and water flows, the applicant must provide information as to how they will mitigate for those deficiencies. Mitigation measures may include, but are not limited to baffles, weirs, roughened channels, and grade control structures.

USACE 404 LETTER OF PERMISSION APPENDIX B: WETLAND DELINEATION REQUIREMENTS

For projects proposing wetland and/or stream impacts, you must submit a Delineation Report in accordance with the 1987 USACE Wetland Delineation Manual and the appropriate Regional Supplement, which includes the following information:

- Surveyed delineation map/drawing of wetlands, ephemeral, intermittent, perennial streams, natural or man-made drainages, swales, and other water conveyances and the location and dimensions of any culverts, drop-in culverts, etc. observed/documentated during the delineation activity. The delineation should also address special aquatic sites including submerged aquatic vegetation. Delineations must be prepared in accordance with the current method required by the USACE under Section 404 of the CWA. This methodology currently includes guidelines contained in the 1987 USACE Wetland Delineation Manual, and appropriate Regional Supplement (Northcentral/ Northeast and/or Eastern Mountains and Piedmont Supplement, as appropriate)
(http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/reg_supp.aspx) and the most current version of the United States Department of Agriculture/ National Resource Conservation Service Field Indicators of the Hydric Soils in the United States.
- Brief (appropriate) interpretation/discussion of information noted on the delineation data sheet for each wetland. (Wetland A is a 1.6 acre palustrine emergent wetland with. . . etc.)
- Completed Wetland Delineation Form for each data point taken. Data points should be representative of the delineation between the upland/wetland boundary (not in the middle of the wetland) along which the survey flags are placed and surveyed. Cross reference the photo number on the appropriate delineation sheet. Make sure that the delineation sheet references the wetland name (Wetland A, etc.). Note that the delineation form is not for use in identifying streams. Streams are described within the text of the Delineation Report based on your in-the field observances.
- Color photographs of each identified ephemeral, intermittent, perennial stream, ditch, conveyance, etc. and each wetland (including those that may be considered isolated and/or non jurisdictional) taken during the growing season.
- Description of vegetative cover types on the site.
- Soil Survey Maps including citation (source of information and date of publication). Include a brief description of each soil series identified on the site and include a statement indicating if the soil is listed in the National List of Hydric Soils and/or the local classification of the soil. Please do not send the soil survey for the entire county. Describe the soils found within the specific project boundary. Please submit the soil survey on a black and white base map – not a black and white copy of the color coded aerial. Include a statement with regard to the hydric indicator choice (Soils meet the ___ indicator because. . .)

- NYSDEC Freshwater Wetlands Maps. If a state regulated wetland is present, identify the wetland by the NYSDEC identification number and also give it a unique name (example: Wetland A).
- National Wetland Inventory (NWI) Maps. Note that the NWI maps are not regarded/ accepted as definitive regulatory maps. These maps are viewed as a resource tool and do not accurately depict the size, presence, or absence of wetlands on any particular parcel.
- The project boundary should be drawn on each map submitted with the application, including the soil map, floodplain map, NWI, NYSDEC Freshwater Wetlands Maps.
- Identify potential habitat for aquatic, amphibian, and mammal species, or direct observation of fauna.

In the event that an Approved Jurisdictional Determination is requested:

- Identification of the watershed boundary, watershed size, drainage area size associated with each stream/wetland system. This will include all abutting and adjacent wetlands associated with the appropriate tributary. (All drainage patterns may be associated with one tributary, or there may be topographical breaks that direct water in different directions creating more than one watershed within the project boundary).
- Identification of on-site tributaries/streams that are classified as: 1) navigable waters under Section 10 of the RHA; 2) streams/waters that are navigable-in-fact or traditionally navigable waters (TNW) under Section 404 of CWA; 3) perennial streams relatively permanent water (RPW); 4) intermittent streams (seasonal/ RPW); 5) ephemeral/headwater stream (non-RPW). Provide documentation to support your identification of each stream. Please do not rely exclusively on the USGS topographic map depiction of a “blue line” stream. If the report indicates ephemeral or intermittent flow you must indicate how you came to that determination – physical characteristic of the stream, on-site observation, information obtained from land owner, highway department, etc. In addition, some ditches may be determined as jurisdictional. Please make observations with regard to perennial or seasonal flow of these features.
- Description of stream substrate composition (e.g. silts, sands, gravel, etc.)
- Description of each identified wetland to an associated stream: i.e., is the wetland adjacent to or physically abutting a perennial, intermittent, ephemeral stream, ditch, culvert, or other conveyance of water from the water body to downstream waters (e.g. Wetland A directly abuts (or is adjacent to) a first order unnamed tributary (Stream 1) to a __ order unnamed tributary (Stream 2) that flows to ___, etc. Follow the water downstream and off-site (if necessary) to show that the water on-site flows to a TNW that may be located off-site. Provide a discussion of the justification for each determination.
- Identification of pollutants that may potentially enter any streams or wetlands; i.e., herbicides, pesticides, petroleum products, road salt, non-point sources (is there agricultural or industrial facilities upslope in the watershed?)

- Justification for proposed “isolated” OR non-jurisdictional determinations on any wetland or stream. Note that these water bodies must be delineated and depicted on the delineation map. Provide the distance of the wetland from the nearest conveyance (culvert, ditch, stream) not the distance from wetland to wetland.
- For Approved Jurisdictional Determination requests, all information contained in the Delineation Report shall be summarized in a table that depicts the following in a separate column for each item listed below. This table should also appear on the Delineation Map.
 - Wetland/Stream Name (Wetland A; Stream 1, e.g.)
 - Wetland type (emergent, scrub/shrub, forested)
 - Stream type (ephemeral/headwater, intermittent, perennial)
 - Stream order
 - Wetland acreage
 - Stream lineal feet and width
 - Stream bottom composition (sand, silt, gravel, cobbles)
 - Wetland – your comments as to the jurisdictional or non-jurisdictional status
 - Wetland - abutting or adjacent

In the event that a Preliminary Jurisdictional Determination is requested:

All information contained in the Delineation Report shall be summarized in a table that depicts the following in a separate column for each item listed below. This table should also appear on the Delineation Map.

- Wetland/Stream Name (Wetland A; Stream 1, e.g.)
- Wetland type (emergent, scrub/shrub, forested)
- Stream type (ephemeral/headwater, intermittent, perennial)
- Wetland acreage
- Stream lineal feet and width