



COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET

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MEMORANDUM

TO: TEBMs for Project Delivery and Preservation, and Project Development
Chief District Engineers
District Environmental Coordinators

FROM: Daniel R Peake, Director
Division of Environmental Analysis

DATE: January 4, 2021

SUBJECT: Consent and Release Agreements and Non-Compliance with Environmental Regulations

Recently a number of consent and release agreements between contractors and private property owners have created out-of-compliance issues for KYTC regarding federal funding, federal permitting and Section 106 of the Cultural Historic Act. These out-of-compliance issues are now requiring mitigation measures from KYTC. These mitigation measures are incurring a burden of expenses upon KYTC and necessitating changes of procedure to assure that future actions do not place KYTC into non-compliance.

The purpose of this MEMO is to notify all staff that consent and release agreements obtained by KYTC contractors are subject to all environmental clearances and permits if the project is federally funded or required a federal permit. This may apply to activities that occur on private property as these activities are being defined (by FHWA and other federal agencies) as federal actions directly related to KYTC projects.

Activities outlined in the consent and release agreements must attain compliance with federal and state environmental laws.

During the Preconstruction phase of a project, KYTC obtains permits and approvals for activities within the Right-of-Way and disturb limits of highway projects. The KYTC also attempts to obtain environmental clearances for activities such as staging, waste and borrow areas. However, contractors sometimes have the need to utilize areas that were not provided environmental clearance. These areas will require additional approval/permits and may include these activities (but not limited to) staging outside of the ROW, parking areas, borrow areas, burying construction debris, using construction debris for stream stabilization, any "side-deals" made between contractors and landowners that occur during or with supplies or equipment used for the highway project, etc. For activities that occur in areas that have not been environmentally cleared by KYTC, the contractor is responsible for obtaining and paying for approvals.

Approvals and/or permits may include, but are not necessarily limited to Section 106 of the State Historic Preservation Office (SHPO), U.S. Fish and Wildlife Service, Kentucky Energy and Environment Cabinet, US Forest Service, US Coast Guard, US Army Corps of Engineers.

The contractor must submit all approvals and permits along with location information to Construction staff who must submit this information to the District Environmental Coordinator before conducting work in the consent and release area.

If a contractor has questions regarding the environmentally cleared zone then please consult with the District Environmental Coordinator.

If a contractor does not comply with the requirements listed above, or if the contractor uses a property in a manner that falls outside the uses covered by the agreements, it will result in liquidated damages assessed. The contractor will be responsible for paying fines, fees, penalties, remediation costs, and damages related to violations of the Threatened and Endangered Species Act (Section 7), National Historic Preservation Act Section 106, Clean Water Act (Sections 401 and 404), Kentucky General Permit for Stormwater Discharges (KYR10), Environmental Protection Agency requirements, SHPO requirements, or jurisdictional agency permits.