



DEPARTMENT OF THE ARMY
GALVESTON DISTRICT, CORPS OF ENGINEERS
P.O. BOX 1229
GALVESTON, TEXAS 77553-1229

REPLY TO
ATTENTION OF.

CESWG-PE-R

21 September 2001

COMMANDER'S POLICY MEMORANDUM

SUBJECT: Galveston District Pipeline Abandonment Policy

1. **PURPOSE.** To outline the policies and procedures of the Galveston District regarding the removal of abandoned pipelines. Refer to 33 C.F.R. Parts 320-330 for the complete text of the regulations for the regulatory program of the Corps of Engineers.
2. **APPLICABILITY.** To all organizational elements of Galveston District, including the area and project offices and contractor personnel doing work for the Corps of Engineers.
3. **REFERENCES.**
 - a. 33 C.F.R. Parts 320-330 Regulatory Program of the Corps of Engineers; Final Rule.
 - b. Section 10 of the Rivers and Harbors Act of 1899.
 - c. Federal Register Volume 40, Number 144, 1974.
 - d. Federal Register Volume 42, Number 138, 1977.
 - e. Galveston District Standard Operating Procedures, dated 9 Aug 95.
 - f. Policy Guidance Letter, Assignment of responsibility for relocation of permitted structures within navigable waters, dated 16 May 86.
 - g. Guidance Letter No. 8, Responsibility for Utility Relocations on Harbor Projects, dated 19 May 88.
 - h. Policy Guidance Letter No. 44, Relocations and Removals at Navigation (Harbor) Projects, dated 20 Oct 95.
 - i. Memorandum, Needed Changes to Standard Permit Conditions for Section 10 Permits, dated 17 Mar 94.
 - j. Standard Permit Condition.
 - k. Special Permit Condition.
 - l. Memorandum, Required Special Condition of Department of the Army Permits Involving Corps of Engineers Authority Under Section 10 of the Rivers and Harbors Act of 1899, received 22 May 00.

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4. BACKGROUND INFORMATION.

a. Background on Rivers and Harbors Act of 1899

Standard Section 10 Law (FR Vol. 40, No. 144, 1974): Section 10 prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over any navigable water of the United States, the excavation from or depositing of material in such waters, or the accomplishment of any other work affecting the course, location, condition or capacity of such waters are unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army.

Preamble of Section 10 (FR, Vol. 42, No. 138, 1977): Section 10 identifies other types of structures or work in or affecting navigable waters of the United States that are prohibited unless permitted by the Corps of Engineers. Section 10 requires permits from the Corps for structures in navigable waters such as piers, breakwaters, bulkheads, revetments, power transmission lines, and aids to navigation. It also requires authorization for various types of work performed in navigable waters, including dredging and stream channelization, excavation and filling. In addition, any work that is performed outside the limits of a navigable water, which affects its navigable capacity, may require a Section 10 permit.

b. Other Guidance/Memos

District SOP (9 August 1995) - Update Permit Files - Pipeline Crossing. (Attachment I)

Multiple Letters - Provides guidance on local sponsors responsibility to remove utility lines from Federal projects. (Attachments II, III, and IV)

Memorandum (17 March 1994) - Indicates the need for more specific wording in permit conditions detailing permittee's responsibility regarding removal or alteration of permitted structures or work, if said structures or work are determined to be an obstruction to navigation. (Attachment V)

c. IP Pipeline General Conditions (various examples of past conditions)

1937, 1947, 1951 - (f) That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of War, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required, upon notice from the Secretary of the War, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation, or other modification of the watercourse hereby authorized shall not be completed, the owners shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of War may require, remove all or any portion of the uncompleted

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structure or fill and restore to its former condition the navigable capacity of the watercourse. No claim shall be made against the United States on account of any such removal or alteration. (Attachment VI)

1958 - Same as 1947 but Secretary of War is replaced with Secretary of the Army.

1974 - (u) That the permittee, upon receipt of a notice of revocation of this permit or upon its expiration before completion of the authorized structure or work, shall, without expense to the United States, at the direction of the Secretary of the Army and in such time and manner as the Secretary or his authorized representative may direct restoration of the waterway to its former condition. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may restore the waterway to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.

1986 Special Condition - (1) That when structures or other work authorized by this permit are determined by the District Engineer to have become obstructive to navigation or when the structures or other work have ceased to be used for the purpose for which they are constructed, the permittee shall remove such structures or other work, the area cleared of all obstructions and written verification thereof given to the District Engineer. (Attachment VII)


2000 Special Condition - The permittee understands and agrees that, if future operation 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 Corps of Engineers, 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 on account of any such removal or alteration. (Attachment VIII)

5. **CONCLUSION.** Based on the above referenced regulations and past permit conditioning, it is apparent that the Corps' jurisdiction over navigable waters includes requiring the removal of abandoned pipelines that may affect the navigable capacity of said waters. Permitted work and/or structures are authorized based on a specific purpose and need. Once a permitted structure is considered "abandoned", it no longer serves its permitted purpose or need and, therefore, should be removed. Historically, special conditioning on Section 10 pipeline permits were the recognized method of addressing the issues of abandonment within navigable waters. Although the current standard conditions do impose the removal requirement, they are not explicitly identified. CECW-OR has addressed this conclusively in a memorandum (Attachment VIII) received electronically on 22 May 2000. By inference, the legal premise is that if a permit is required for a pipeline to be placed in a navigable water and then abandoned, then logic would require removal.

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Galveston District's policy regarding "abandoned" pipelines is to require removal unless there is an overwhelming reason for allowing the pipeline to remain. Circumstances allowing a pipeline to remain in place should be rare and allowed only after careful evaluation of key factors associated with the pipeline and it's route. Key factors to be considered in allowing an "abandoned" pipeline to remain in place include, but are not limited to, the potential effects to navigation and Federal projects, and the potential for significant environmental impacts due to pipeline removal. This policy ensures the fulfillment of our responsibilities under Section 10 to keep navigable waters free of obstructions for navigation (33 CFR 322.3). This premise is substantiated by past practices of permit conditioning as demonstrated in the general conditions.



Leonard D. Waterworth
Colonel, Corps of Engineers
District Engineer

Standard Operating Procedures Update Permit Files - Pipeline Crossings

OBJECTIVES: Update files for permits that authorized the placement of pipelines across navigation channels in Galveston District. This is another Total Quality Management/Continuous Improvement application by Regulatory to improve their way of doing business.

BACKGROUND: Section 10 of the Rivers and Harbors Act of 1899, provides for the Corps of Engineers to regulate the placement of pipelines affecting navigable waters of the United States. Conditions on the permits require that the permittees notify the District Engineer upon completion of construction and to provide "as-built" drawings to the appropriate Area Engineer. In addition, permittees are also required to notify the District Engineer whenever the pipeline ceases to be used for its intended purpose or when the permit is transferred to another party. Despite these requirements, we have found that the majority of pipeline permit files are deficient. We have found that several permitted pipelines have been abandoned or the permits transferred without proper notification. Current and accurate pipeline locations are extremely important, especially when needed to formulate plans for maintenance or and/or improvements to navigation projects. Proposed improvements to federal projects such as the Channel to Victoria and the Houston-Galveston channel recently required massive research to update pertinent pipeline permit files. This research was needed within a very short time frame in order to maintain the project's schedule but at the expense of delaying other regulatory actions.

ACTION PLAN: Review all permits on file that authorize pipeline crossings under Section 10 of the Rivers and Harbors Act of 1899. Priority will be given to those pipelines crossing Federal project navigation channels. The outcome of the review should assure, as a minimum, ownership and the exact location (horizontal and vertical) of the pipeline. Detailed step-by-step procedures for reviewing the existing pipeline permit files are attached (See Attachment A).

All new permits issued to authorize pipeline crossings under Section 10 of the Rivers and Harbors Act of 1899 will be conditioned to require the following:

1. As-built drawings certified by a professional engineer or registered surveyor. These drawings will be submitted to the Regulatory Branch, Galveston District, upon completion of the work. The drawings will

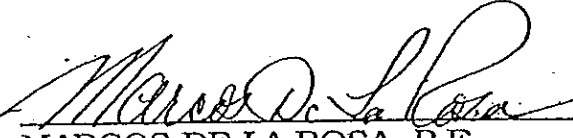
include a plan view showing the horizontal location of the pipeline by channel station or river mile at its crossing with the centerline, or by state grid coordinates. The drawings will also include a vertical view showing the total profile of the pipeline crossing the entire channel/river. The channel's cross-section template must also be shown. If on a river crossing, the river bottom must be shown, as a minimum, from bank to bank.

2. The permittee will report the status of the pipeline on a yearly basis (by 31 December) to the Regulatory Branch, Galveston District. The report will include, as a minimum, the owner of the pipeline, type of material transported, and verification that the pipeline is still in use or not in use.

3. Pipeline locations will be marked with appropriate signs on both sides of the channel/river crossings. The signs will contain, as a minimum, the pipeline owner's name and a responsible persons name and telephone number to contact in case of need.

The responsibility for updating the permit files, as well as compliance inspections, is assigned to the Enforcement Section.

9 Aug 95
Date



MARCOS DE LA ROSA, P.E.
Chief, Regulatory Branch

ATTACHMENT A

Existing Permit Files:

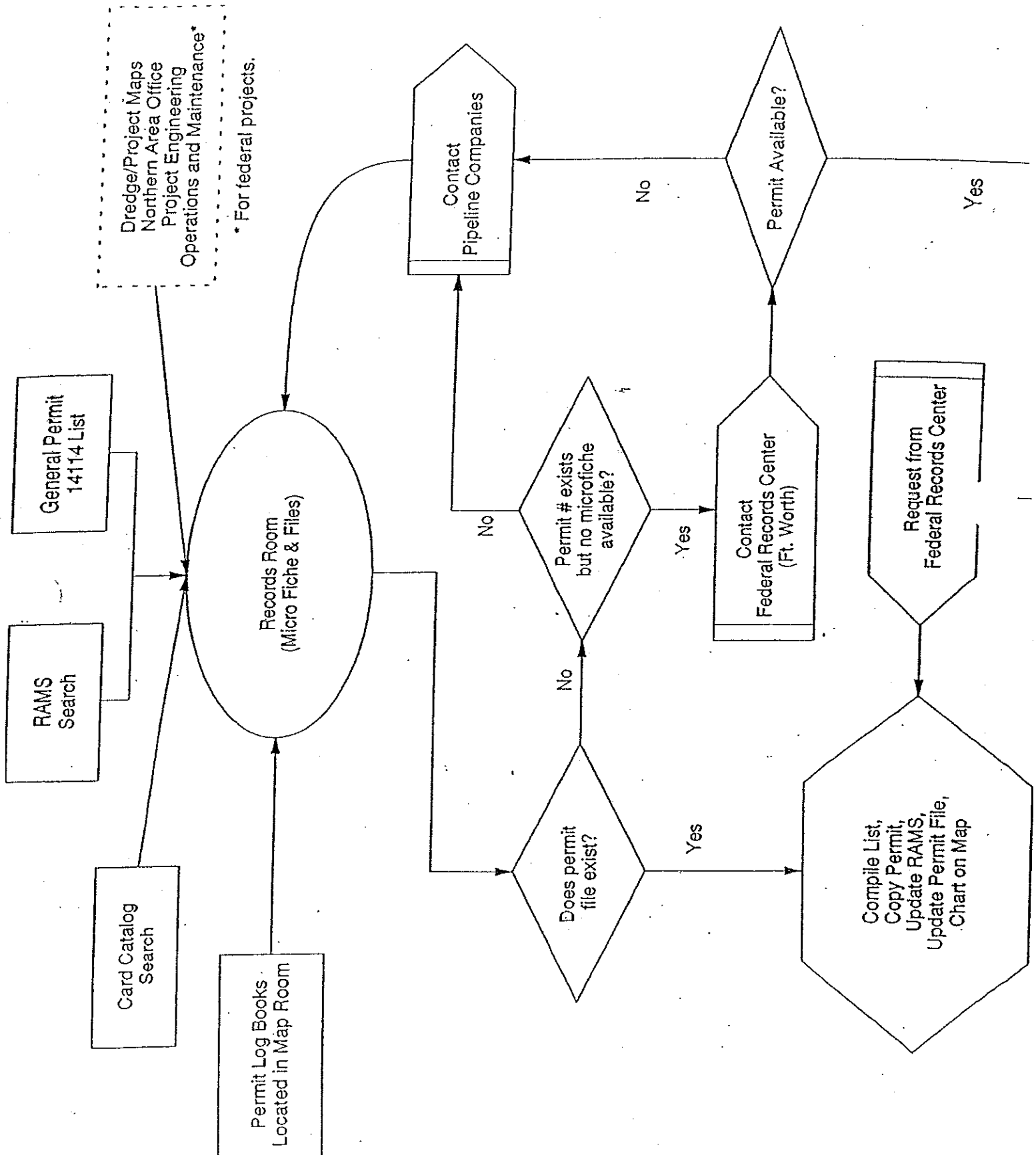
1. Identify the waterway.
2. Research RAMS Query Screen. Type "*pipeline*" in the Approved Work Type and enter the pertinent waterway. Press ESC. RAMS will list all approved pipelines. This list will only accurately reflect permits issued from 1992 to present.
3. Research card catalog by County and waterway. Record all permit numbers not identified in step 2 that identify the work as a pipeline. Also record the company name, the pipeline location (COE Station number or other), the number and size of pipelines, permit transfers, and any other pertinent information.
4. Research issued list for General Permits 14114 and 15800. The Legal Instruments Examiner keeps the updated master lists. Record the permit number and company name of pipelines crossing the pertinent waterway of permits not identified in step 2 or 3.
5. Research permit log books for pipelines issued prior to conversion to the current numbering system. Record the permit number (if applicable), the company name, the location, plus the number and size of the pipelines not identified in steps 2 through 4.
6. For Federally maintained waterways, research dredge/project maps obtained from Operations and Maintenance, Project Engineering, and/or the pertinent area office. Record permit number, company name, the location, plus the number and size of the pipelines not identified in steps 2 through 5.
7. Once all resources available in the District have been examined, research recorded permit numbers on the microfiche in the Records Room. If there is a permit number located in the microfiche but the film does not exist, contact the Federal Records Center in Fort Worth, Texas (see Administrative Section for assistance). Request a copy if the permit is available. If the permit file does exist, copy permit.
8. Contact the most recent company listed on the permit to confirm pipeline ownership. If confirmed, request as-built plans or their most recent survey. If they no longer own the pipeline, ask for the company that purchased the pipeline and a point of contact. Repeat if necessary.

9. If a permit file can not be located, attempt to contact the company by telephone to determine pipeline ownership. Once ownership is confirmed, request as-built plans or their most recent survey. If they do not own the pipeline, ask for the company that purchased the pipeline and a point of contact. Contact the new owner and determine pipeline ownership.

10. Update the permit file with the current owner, the location, the as-built or survey, and any other pertinent information.

11. Update or create RAMS with the current owner, the location, and any other pertinent information. A new action ID and the correct permit number may be required.

12. Create mapping system identifying pipeline owner, number and size of pipelines, and location.



ATTACHMENT II

SWDOC

16 May 86

SUBJECT: Policy Guidance Whether Permittees Under DOA Permit (Section 10) or Local Sponsor Under Local Cooperation Agreement for a Federal Project Should Assume the Cost of Relocation for Permitted Structures Within Navigable Waters

CDR USACE (DAEN-CCZ-A)
20 Massachusetts Avenue, N.W.
WASH DC 20314-1000

1. On August 27, 1985, a letter from the Galveston District, SAB (copy attached) was forwarded to you. We concurred with the District Commander's recommendation that the local sponsor should bear the cost of relocations in accordance with its agreement.

2. The local sponsor is still pressing its position and the matter has now been drawn to the attention of Congressman Brooks who feels costs should be borne by the permittees. The District now agrees with that view and initiated alteration notices to at least one pipeline owner (who claims costs should not be borne by it). Your response to the original inquiry would facilitate a consistent Corps approach to this question.

FOR THE COMMANDER:

Atch

HECTOR VELA
Division Counsel

Steinberg
DEPO. EX. # 2
66-91 DATE
LARRY CARROLL

DAEM-CCJ (16 May 86) 1st End
SUBJECT: Policy Guidance Whether Permittees Under DQA Permit
(Section 10) or Local Sponsor Under Local Cooperation
Agreement for a Federal Project Should Assume the Cost
of Relocation for Permitted Structures Within Navigable
Waters.

HQEA(DAEM-CCJ), Washington, D. C. 20314-1000

11 A

TO: Commander, U.S. Army Corps of Engineers Division,
Southwestern, ATTN: SWDOC, 1114 Commerce Street, Dallas,
TX 75242

1. This is in reply to your request concerning responsibility for alterations and relocations of pipelines that are necessary to construct the project for flood protection on Taylors Bayou, Texas. The CDR, Galveston District, informed the CDR, USACE, by letter of August 5, 1985 that the local sponsor of this project is responsible for the necessary alterations and relocations of the pipelines. The CDR, Southwestern Division, informed the CDR USACE, by letter of August 17, 1985 that the Division concurred in the District's position on this matter. Your letter of May 16, 1985 informs me that the Galveston District has changed its position on this matter and now recommends that the permittees or owners of the affected pipelines be responsible for the necessary alterations and relocations of the pipelines. I understand, moreover, that the Southwestern Division may also have changed its position on this matter to accord with the District's current recommendation.

2. The project for flood protection on Taylors Bayou, Texas was authorized by the Flood Control Act of 1965 (Public Law 89-298) to be constructed substantially as recommended by the Chief of Engineers in House Document Numbered 206, 89th Congress. The Chief of Engineers authorized recommendations for this project included as a condition of its construction, that local interest "...make all necessary alterations and relocations of structures and utilities..." House Doc. 206, 89th Cong., at pg. 4. This requirement of local sponsorship for the project was premised on a recommendation of the Galveston District Engineer in an accompanying survey report of the project that local interests "...[a]ccomplish without cost to the United States all alterations and relocations of pipelines, utilities, and highway bridges necessary for construction of the project when and as required." id. at pg. 70. This recommendation of the District Engineer, in turn, followed a discussion in his survey report noting both that there were many pipeline crossings on the channels to be improved and that information available at that time indicated that the pipelines would not have to be altered construct the recommended improvements. id. at pg. 47.

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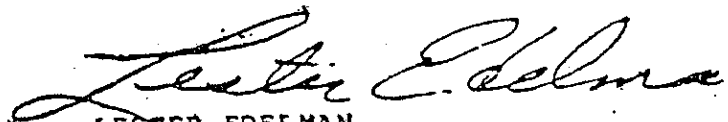
Steinberg
DEPO. EX. # 10
6-6-91 DATE
LARRY CARROLL

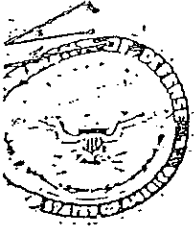
DAEN-CCJ (16 May 86) 1st End
 SUBJECT: Policy Guidance Whether Permittees Under DOA permit
 (Section 10) or Local Sponsor Under Local Cooperation
 Agreement for a Federal Project Should Assume the Cost
 of Relocation for Permitted Structures Within Navigable
 Waters.

Nonetheless, you have informed me that the actual construction of these flood control improvements will now require the alteration or relocation of a large number of pipelines. I understand, moreover, that the primary reasons for this seeming anomaly are that many of the currently affected pipelines were constructed after the 1965 authorization for the flood control improvements and in a manner that has proven inconsistent with the existing development of those improvements.

3. I find that the alterations and relocations of pipelines that are necessary to construct the project for flood protection on Taylors Bayou must be undertaken and accomplished at no expense to the federal government. I also find that the local sponsor of this project is and must be held to be ultimately responsible for the pipeline alterations and relocations. This is not to deny, however, that you may elect to require that the permittees or owners of the affected pipelines bear the costs of the alterations and relocations that are occasioned by their existing pipelines. The legal rationale for this requirement will be nonetheless arguable and subject to serious challenges. Accordingly, prior to any federal undertaking to require affected pipeline permittees or owners to bear any expenditures for alterations or relocations of their pipelines for purposes of this project, it will be particularly important that the local sponsor of this project explicitly agree to hold and save the federal government free from any costs or damages to the federal government that might result from the undertaking.

FOR THE COMMANDER:


 LESTER EDELMAN
 Chief Counsel



DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

ATTACHMENT II

REPLY TO
ATTENTION OF:

CECW-RN

19 MAY 1988

MEMORANDUM TO: SEE DISTRIBUTION

SUBJECT: Guidance Letter No. 8, New Start Construction
Projects--Responsibility for Utility Relocations on Harbor
Projects

1. References:

a. DAEN-CWR-N letter dated 9 April 1986, subject: Local
Cooperation Agreements for FY 1985 Supplemental New Start
Construction Projects.

b. EC 1165-2-144

2. Paragraph 3 of reference 1.a. provided that Corps permit
authority was not to be invoked to facilitate the relocation of
utilities in navigable waters of the United States. That policy
was based on the premise that the non-Federal sponsor, and not
the permittee, is the beneficiary of the project and is,
therefore, responsible for these relocations. The following is a
clarification of policy on utility relocations as a result of
provisions contained in the Water Resources Development Act of
1986 (P.L. 99-662).

3. Utility Relocations on Harbor or Inland Harbor Navigation
Projects--Depth Less Than 45 Feet. For navigation projects
authorized for less than 45 feet in depth, Section 101(a)(4) of
P.L. 99-662 requires that the non-Federal interests "shall
perform or assure the performance of all relocations of utilities
necessary to carry out the project." It is the basic
responsibility of the local sponsor to assure that utilities are
relocated at non-Federal expense. This does not affect any
ability of the sponsor to arrange with the utility owner to
perform the work, and/or to absorb the costs, of the
relocations.

4. Utility Relocations on Harbor or Inland Harbor Navigation
Projects--Depth in Excess of 45 Feet. For navigation projects
authorized for greater than 45 feet in depth, Section 101(a)(4)
further provides that one-half of the cost of each utility
relocation be borne by the utility owner and one-half by the
local sponsor. Again, as in paragraph 3 above, it is still the
basic responsibility of the sponsor to assure that utilities are
relocated at non-Federal expense. The 50-50 cost sharing betw
the owner and local sponsor applies even when the deepening be
performed on a project authorized for greater than 45 feet is
being deepened to less than 45 feet.

CECW-RN

SUBJECT: Guidance Letter No. 8, New Start Construction Projects--Responsibility for Utility Relocations on Harbor Projects

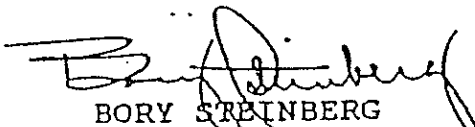
5. The local sponsor is not entitled to any credit for utility relocation costs against the cost sharing required in either Section 101(a)(1) or the 10 percent repayment required under Section 101(a)(2).

6. In either case the District may provide, as a service, the Engineering and Design, Supervision and Inspection, and may administer the contract for the relocation, when such activities are paid for in advance.

7. Use of Federal Authority to Compel Utility Relocations. In those cases where the local sponsor has, despite every reasonable effort, failed to reach agreement with affected owners regarding utility relocations, and further, lacks the authority to compel the utility relocations, the Federal Government may elect to exercise Federal authorities to compel the utility relocations. Any such exercise of Federal power shall not, however, relieve the local sponsor of its statutory responsibility to assure the performance of the relocations at no expense to the Federal Government. Consequently, any Federal expenses incurred in compelling the relocations will be borne entirely by the local sponsor including administration and litigation expenses. Federal funds will not be made available to conduct the actual relocation or alteration. Moreover, any Federal action shall in no way determine the ultimate apportionment of the relocation costs between the utility owners and the local sponsor. In all but deep-draft harbors (for which utility owners and local sponsors must share equally in utility relocation costs), the question of how utility relocation costs are shared is to be resolved between the local sponsor and the owners of the facilities being relocated.

8. If you have any further questions please contact Doug Lamont or Peter Luisa CECW-RN at 202-272-0464.

FOR THE COMMANDER:


BORY STEINBERG
Chief, Policy, Review
and Initiatives Division
Directorate of Civil Works

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

ATTACHMENT IV



REPLY TO
ATTENTION OF:

20 OCT 1995

CECW-AA

MEMORANDUM FOR COMMANDERS, MAJOR SUBORDINATE COMMANDS

SUBJECT: Policy Guidance Letter (PGL) No. 44, Relocations and Removals at Navigation (Harbor) Projects

1. **Purpose.** This PGL sets forth U.S. Army Corps of Engineers policy regarding the relocation and removal of facilities interfering with Federal navigation improvements. This guidance supersedes previous guidance on this subject. The guidance is applicable to navigation projects for harbors or inland harbors.
2. **Background.** Under Section 101(a) of the Water Resources Development Act of 1986 (WRDA 86), as amended by the Water Resources Development Act of 1988, the non-Federal sponsor provides the lands, easements, rights-of-way, relocations (other than utility relocations) and dredged material disposal areas necessary for the project. The non-Federal sponsor also is to perform or assure the performance of all relocations of utilities necessary to carry out the project. The law does not define what constitutes a relocation nor delineate who will be responsible to bear the costs of the relocation except that for utility relocations for projects of depth greater than 45 feet, one-half of the costs of relocation shall be borne by the owner of the facility being relocated and one-half by the non-Federal sponsors. Under Section 101(a)(2) of WRDA 86, as amended, the value of lands, easements, rights-of-way, relocations and dredged material disposal areas and the costs of utility relocations borne by the sponsor shall be credited to the additional 10 percent share of general navigation facilities costs.
3. **Problem.** Private property rights within navigable waters are subject to the common law principle of navigation servitude which is the public's right of free use of all streams and water bodies for navigation despite the private ownership of the bottom or shoreline. Therefore, no further Federal real estate interest is required for navigation projects in navigable waters below the ordinary high water mark. In support of the principle of navigation servitude and in exercise of Congress' power over navigation stemming from the Commerce Clause of the Constitution, Section 10 of the River and Harbor Act of 1899 requires approval from the Corps of Engineers prior to placing obstructions or excavating or disposing of material in navigable waters. Permits under Section 10 do not authorize interference with any existing

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 SUBJECT: Policy Guidance Letter (PGL) No. 44, Relocations and Removals at Navigation (Harbor) Projects

on proposed Federal project and provide that the permittee pay for any corrective measures to comply with permit conditions. This PGL provides guidance on the interaction of the Federal rights under the navigation servitude and associated Federal permits and the non-Federal sponsor responsibilities under Section 101(a) of WRDA 86, as amended, with regard to relocations and removals of obstructions at Federal navigation projects.

4. Policy.

a. Relocation Definition. The term "relocation" shall mean providing a functionally equivalent facility, regardless of the depth of the navigation project, to the owner of an existing utility, cemetery, highway, railroad (including a bridge thereof), or other public facility (excluding existing bridges over navigable waters of the United States) when such action is authorized in accordance with applicable legal principles of just compensation. A "relocation" is also providing a functionally equivalent facility when such action is specifically provided for, and is identified as a relocation, in the authorizing legislation for a navigation project or any report referenced in the authorizing legislation. Providing a functionally equivalent facility may take the form of alteration, lowering, raising, or replacement and attendant removal of the affected facility or part thereof.

b. Discussion of Definition.

(1) A relocation must occur when a facility or part of a facility must be altered, lowered, raised, or removed to allow for the construction, operation, or maintenance of the general navigation features of a project, including those necessary to enable the removal of borrow material or the proper disposal of dredged or excavated material, and the owner of the facility is entitled to a substitute facility due to just compensation principles. Just compensation principles generally dictate that a substitute facility is the proper measure of just compensation when the facility's owner has a compensable real property interest that must be extinguished in the land on which the facility is located; there is a public necessity for the service provided by the facility; and market value has been too difficult to find, or the application of market value would result in injustice to the owner or public. This definition focuses on the issue of just compensation as between the facility owner and the Federal government and takes into account all rights that the Federal government has within the navigation servitude. Therefore, the owner of a facility within the navigation servitude has no compensable real property interest that must be

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 SUBJECT: Policy Guidance Letter (PGL) No. 44, Relocations and Removals at Navigation (Harbor) Projects

extinguished with regard to the Federal government for the portion of the structure within the navigation servitude and the owner of the facility within the servitude is not entitled to a substitute facility when compelled to remove the facility because it is an obstruction to the Federal navigation project.

(2) A relocation also must occur when it is specifically authorized as a relocation by Congress. When an authorizing document approved by Congress specifies that the alteration, lowering, raising, or removal and attendant replacement of a facility or portion of a facility constitutes a relocation, it is treated as a relocation even when it does not otherwise meet the definition discussed in paragraph 4.b.(1). The non-Federal sponsor will be required to perform or assure the performance of the relocation and the value of the relocation (or the costs borne by the non-Federal sponsor for any utility relocation) is creditable against the non-Federal sponsor's required additional 10 percent repayment under Section 101(a)(2) of WRDA 86, as amended. This definition of a relocation is included in this PGL to recognize that facility alterations, lowerings, raisings, and removals and attendant replacements have been authorized as relocations even though they do not meet the definition of a relocation discussed in paragraph 4.b.(1). For future navigation project formulation and preparation of feasibility reports, the definitions of relocations, removals and deep draft utility relocations contained in this PGL will be used to categorize and assign costs for actions involving facilities interfering with proposed navigation improvements.

(3) If removing an obstruction falls within the definition of a relocation presented in 4.b.(1) and 4.b.(2), the non-Federal sponsor will be required to perform or ensure the performance of the relocation. For a relocation other than a utility relocation, the value of the relocation is creditable against the non-Federal sponsor's required additional 10 percent payment under Section 101(a)(2) of WRDA 86, as amended. For a utility relocation, the non-Federal sponsor's actual costs in performing or assuring the performance of the utility relocation are creditable against the non-Federal sponsor's required additional 10 percent repayment under Section 101(a)(2) of WRDA 86, as amended. In practice, under the terms of the project cooperation agreement (PCA), the cost of the relocation will be the basis for computing non-Federal sponsor credit for all relocations.

(4) If removing an obstruction within the navigation servitude does not fit within the definition of a relocation as discussed in paragraph 4.b.(1) and 4.b.(2), it will be treated as

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a removal necessary for the general navigation features (GNF) of the project, unless it qualifies as a deep draft utility relocation under paragraph 4.c. Removals are discussed in paragraph 4.d.

c. Deep-Draft Utility Relocations.

(1) "Deep draft utility relocations" are handled differently and are only applicable to projects authorized at a depth of greater than 45 feet. A deep draft utility relocation is defined as providing a functionally equivalent facility to the owner of an existing utility serving the general public when such action is not a "relocation" as defined in paragraph 4.a. and is necessary for the construction, operation, or maintenance of the general navigation features of the project, including those necessary to enable the removal of borrow material or the proper disposal of dredged or excavated material. In accordance with Section 101 (a) (4) of WRDA 86, as amended, one-half of the cost of the deep draft utility relocation shall be borne by the utility owner and one-half shall be borne by the non-Federal sponsor. Actual costs of deep draft utility relocations borne by the non-Federal sponsor up to 50 percent of the total cost of the utility relocation will be creditable against the non-Federal sponsor's additional 10 percent share.

(2) The Corps may compel deep draft utility relocations if confronted with reluctant utility owners. However, such involuntary deep draft utility relocations would be for the purpose of facilitating project construction and would not serve to change the statutory requirement for 50/50 cost sharing between the non-Federal sponsor and the utility owner. Therefore, in those cases where the utility owners are compelled to relocate, the non-Federal sponsor is responsible for one-half of the cost of these deep draft utility relocations. Administrative and any legal costs incurred by the Corps to compel deep draft utility relocations would be shared 50/50 between the non-Federal sponsor and the utility owner.

d. Removals.

(1) Where there is an obstruction to a navigation project that is within the navigation servitude, and that obstruction does not fit within the definition of a deep draft utility relocation as presented in paragraph 4.c. or the definition of a relocation in paragraph 4.a., the obstruction will be removed at owner cost to accommodate the navigation project.

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(2) Where the non-Federal sponsor has the capability to compel the owner of a facility obstructing a navigation project to remove the facility solely at owner cost, the non-Federal sponsor will be required to exercise this capability. The capability of the non-Federal sponsor to successfully compel the removal of facilities at owner cost will be jointly assessed by the Corps and the non-Federal sponsor. Factors in this assessment will include the legal authorities available to the non-Federal sponsor and their strength, the applicability of the non-Federal sponsor's authorities to the Federal navigation project and the record of success in exercising the non-Federal sponsor's authorities. The non-Federal sponsor may also elect to directly negotiate with the owner of a facility obstructing a navigation project for the removal of the facility in lieu of exercising any non-Federal sponsor or Corps authorities to compel the facility removal at owner cost. However, any payments or reimbursements by the non-Federal sponsor to the facility owner for the removal of the facility would not be creditable against the non-Federal sponsor's required additional 10 percent repayment under Section 101(a) (2) of WRDA 86, as amended.

(3) In the event it is determined that the non-Federal sponsor does not have the capability to compel the owner of a facility obstructing a navigation project to remove the facility at owner cost and the non-Federal sponsor does not elect to directly negotiate with the facility owner for the removal of the facility, if the non-Federal sponsor is not a state, the non-Federal sponsor will request that the state exercise any capability that it has to compel the facility removal at owner costs. If the state does not have the capability to compel removal at owner cost, both the non-Federal sponsor and the state must request, in writing to the District Engineer, that the Corps exercise its rights under the navigation servitude and applicable Corps permit conditions to require the owner to perform the removal of the facility at owner expense. The letter from the state must be signed by the governor or a state official that the governor specifically designates to make the request. Based upon a request from the non-Federal sponsor and the state, the Corps will exercise its rights under the navigation servitude to compel removals at owner cost. If the state has the authority to compel removals at owner cost but declines to exercise its authority or does not have the authority but is not willing to request that the Corps exercise its authority, the Corps will not exercise its rights under the navigation servitude to compel relocations at owner cost. Under these circumstances, the navigation project cannot be implemented or recommended for implementation unless the non-Federal sponsor is willing to directly negotiate with facility owners for facility removal recognizing that any

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payments or reimbursements by the non-Federal sponsor to the facility owner would not be creditable against the non-Federal sponsor's required additional 10 percent share.

(4) When a facility is removed at owner cost, the facility removal cost and any cost to replace the facility at a new location (for example at a greater depth) will be an owner cost. The administrative and legal cost to the non-Federal sponsor or the Corps of requiring the owner to remove the obstruction will be considered GNF costs and shared accordingly. Corps regulatory program funds will not be used for accomplishing removals or permitting owner replacements of removed facilities. Costs to the owner of a facility for its removal and any owner replacement costs, including any costs voluntarily paid or reimbursed by the non-Federal sponsor, will be accounted for as associated costs of the project and are not shared GNF costs or non-Federal sponsor costs for lands, easements, rights-of-way or relocations. As associated costs, owner removal and replacement costs are economic costs of the project that must be reflected in the calculation of net national economic development benefits. Where necessary, the Corps may also have the option to remove the obstruction itself. The costs to the Corps of removing the obstruction will be considered costs of the general navigation features of the project and shared accordingly. In these cases, the Corps will pursue appropriate remedies for reimbursement to the Corps and the non-Federal sponsor of the costs by the owner of the obstruction.

a. Court Actions. In the event a court determines that the owner of a facility within the navigation servitude is entitled to payment of just compensation as a result of a removal action, that compensation amount will be considered a cost for lands, easements, and rights-of-way, which the non-Federal sponsor will be required to pay in accordance with Section 101(a)(3) of WRDA 86, as amended. If the court also determines the appropriate measure of just compensation is provision of, or payment based on, a substitute facility, this will be considered a relocation, which the non-Federal sponsor will be required to provide in accordance with Section 101(a)(3) of WRDA 86, as amended.

5. Decision Process.

a. Feasibility Phase Survey. During the feasibility phase of the project, the Corps, in cooperation with the non-Federal sponsor, will identify all the facilities obstructing the proposed navigation project and determine, in each case, the ownership interest of the facility owner (for lands located outside the navigation servitude) and the Federal, state or local

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instrument (permit, easement, etc.), if any, through which the facility owner has use of the land. The survey will also determine, for facilities outside the navigation servitude, the nature of the use of the facility and whether the owner of the facility is entitled to a substitute facility. These surveys would be part of the cost of the feasibility study and would be cost shared on a 50-50 basis with the non-Federal sponsor.

b. Definition of Responsibilities. Based on the results of the information collected in the surveys of the facilities, the navigation feasibility report will clearly define responsibilities and assign costs for altering, lowering, raising, or removing and replacing facilities within the navigation servitude in accordance with the policies presented in this PGL. Responsibilities and costs will be assigned to the non-Federal sponsor or facility owners. A step-by-step decision process for classifying actions as relocations, removals or deep draft utility relocations is enclosed. It is recognized that considerations of costs and schedules may preclude final decisions on compensability and the need to provide substitute facilities during the feasibility study. In these cases the feasibility study will clearly define responsibilities and costs for relocations and removals based on preliminary findings but qualify these findings as subject to modification based on more detailed and complete post authorization studies. The feasibility report will also include a determination of the responsibility to compel removals including the assessment of the capability of the non-Federal sponsor and the state to compel removals at owner cost and, as applicable, the letters from the non-Federal sponsor and the state requesting the Corps to exercise its rights under the navigation servitude to compel removals at owner cost. In accordance with the policies presented in paragraph 4.d., the responsibility to compel relocations at owner cost will be assigned to the non-Federal sponsor, the state, or the Corps.

6. Regulation Modification. This PGL refines significantly the guidance concerning relocations and removals provided in ER 1165-2-131. Regulations will be modified, as required, to incorporate the guidance contained in this policy letter.

FOR THE COMMANDER:

Encl

Stanley G. Genega
 STANLEY G. GENECA
 Major General, USA
 Director of Civil Works

NAVIGATION RELOCATION AND REMOVAL DECISION PROCESS

1. Is the facility a bridge over navigable waters? Yes - It is not a relocation or a removal and costs of modification or replacement are shared between the bridge owner, the Federal government and the non-Federal sponsor (See ER 1105-2-100). No - Go to step 2.
2. Is the alteration, lowering, raising, or removal and replacement of the facility specifically authorized as a relocation by Congress. Yes - Go to step 5. No - Go to step 3.
3. Considering all rights that the Federal government has in the navigation servitude, do applicable legal principles of just compensation require that the owner of the facility be provided a functionally equivalent facility? Yes - Go to step 5. No - Go to step 4.
4. Is the project greater than 45 feet? Yes - Go to step 13. No - Go to step 6.
5. The alteration, lowering, raising, or removal and replacement is a relocation. The non-Federal sponsor must perform or assure the performance of the relocation.
6. The action is a removal. Does the non-Federal sponsor have the capability to compel the removal at owner cost or elect to negotiate the removal with the facility owner? Yes - Go to step 7. No - Go to step 8.
7. The non-Federal sponsor will compel the removal of the facility at owner cost or negotiate the removal.
8. If the non-Federal sponsor is not a state, does the state have the capability to compel the removal at owner cost? Yes - Go to step 9. No - Go to step 10. If the non-Federal sponsor is a state go to step 10.
9. The state will compel the removal of the facility at owner cost. If the state declines to exercise its authority go to step 12.
10. Will the non-Federal sponsor and the state request the Corps to exercise its rights under the navigation servitude and any applicable permit conditions? Yes - Go to step 11. No - Go to step 12.
11. The Corps will exercise its rights under the navigation servitude and any applicable Corps permit conditions to require the owner to perform the removal of the facility at owner's expense.

NAVIGATION RELOCATION AND REMOVAL DECISION PROCESS
(Continued)

12. The Corps will not exercise its rights under the navigation servitude and applicable permits and the non-Federal sponsor must negotiate facility removals with facility owners.

13. Is the facility a utility serving the general public? Yes - Go to step 14. No - Go to step 6.

14. The alteration, lowering, raising, or removal and replacement is a deep draft utility relocation. The non-Federal sponsor must perform or assure the performance of the deep draft utility relocation with one-half of the cost borne by the non-Federal sponsor and one-half borne by the utility owner.

CECC-E

117 MAR 1994

MEMORANDUM FOR THE DIRECTOR OF CIVIL WORKS

SUBJECT: Needed Changes to Standard Permit Conditions for Section 10 Permits

1. Recently the U.S. Court of Appeals for the Fifth Circuit decided the case United Texas Transmission Company v. United States Army Corps of Engineers, ___ F.2d ___ (5th Cir., 1993), which decision was an important victory for the Corps and for our program of water resource development. As you probably recall from your days as Commander of the Southwestern Division, in that case the plaintiff (UTTCO) challenged the authority of the Corps to enforce the terms of a Section 10 permit by requiring UTTCO to remove and relocate its natural gas pipeline at its expense, to facilitate construction of a flood control project.
2. The Fifth Circuit's decision serves as a reminder of at least four important points: (1) In certain, particular circumstances, the successful construction of a Corps water resource development project requires the Corps to utilize our regulatory authorities under Section 10 of the Rivers and Harbors Act of 1899; (2) The precise wording of the conditions of a Section 10 permit might determine whether we succeed or fail in our effort to require a permittee to remove a permitted structure at his expense; (3) The Court of Appeals relied upon the explicit, clear wording of the Section 10 permit condition to justify its decision against UTTCO and supporting the Corps and our partner, the local flood control district; and (4) Unfortunately, that essential, explicit permit condition that served us so well in the UTTCO case is no longer part of the Corps' standard permit form.
3. Over the years the Corps' standard permit conditions contained in our standard permit form have varied. During the mid-eighties those standard conditions were greatly shortened and simplified in an effort to make the permit form more easily understood by permit applicants. Unfortunately, the revision of the mid-eighties substituted a vague, abbreviated permit condition for the more clear and explicit condition cited with approval by the Fifth Circuit in UTTCO. The current standard condition reads as follows:

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

This condition is inadequate, because it is vague and does not clearly put the permit applicant on notice that he will have to remove his permitted structure at his expense if the Corps determines at any time after he receives his permit that his structure interferes with or will interfere with navigation or any

existing or future operation of the United States. Moreover unlike the permit condition cited as the basis of the decision 1 UTTCO, the new permit condition has not been tested in or construed by the Federal Courts.

4. In my opinion the UTTCO decision should stimulate us to send guidance to every Corps command with regulatory program responsibilities, instructing them to insert the following condition in every Section 10 permit issued henceforward:

The permittee understands and agrees that, if future operations by the United States require the removal, or alteration in the position, 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 Corps of Engineers, to remove or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

5. Over the next several months, as we revise the Corps regulations governing the regulatory program, I suggest that the condition just quoted be substituted for the more abbreviated and vague condition quoted in paragraph 3, above. In the meantime however, to protect the interests of the United States (and, in appropriate cases, to protect the interests of our partners, the local, cost-sharing sponsors of our projects), I suggest that some form of interim guidance letter be sent to all Corps commands promptly, since section 10 permits are issued every day.

6. My point of contact for this memorandum is Lance D. Wood, CECC-E, whose telephone number is 272-0035.



LESTER EDELMAN
Chief Counsel

(a) That the work shall be subject to the supervision and approval of the District Engineer, Engineer Department at Large, in charge of the locality, who may temporarily suspend the work at any time, if in his judgment, the interest of navigation so require.

(b) That any material dredged in the prosecution of the work herein authorized shall be removed evenly, and no large refuse piles, ridges across the bed of the waterway, or deep holes that may have a tendency to cause injury to navigable channels or to the banks of the waterway shall be left. If any pipe, wire, or cable hereby authorized is laid in trench, the formation of permanent ridges across the bed of the waterway shall be avoided and the back filling shall be so done as not to increase the cost of future dredging for navigation. Any material to be deposited or dumped under this authorization, either in the waterway or on shore above high-water mark, shall be deposited or dumped at the locality shown on the drawing hereto attached, and, if so prescribed thereon, within or behind a good and substantial bulk head or bulkheads, such as will prevent escape of the material into the waterway. If the material is to be deposited in the harbor of New York, or in its adjacent or tributary waters, or in Long Island Sound, a permit therefor must be previously obtained from the Supervisor of New York Harbor, Army Building, New York City.

(c) That there shall be no unreasonable interference with navigation by the work herein authorized.

(d) That if inspections or any other operations by the United States are necessary in the interests of navigation, all expenses connected therewith shall be borne by the permittee.

(e) That no attempt shall be made by the permittee or the owner to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure.

(f) That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of War, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required, upon due notice from the Secretary of War, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation, or other modification of the watercourse hereby authorized shall not be completed, the owners shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of War may require, remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the watercourse. No claim shall be made against the United States on account of any such removal or alteration.

(g) That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.

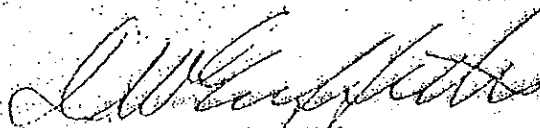
(h) That if the display of lights and signals on any work hereby authorized is not otherwise provided for by law, such lights and signals as may be prescribed by the U. S. Coast Guard, shall be installed and maintained by and at the expense of the owner.

(i) That the permittee shall notify the said district engineer at what time the work will be commenced, and as far in advance of the time of commencement as the said district engineer may specify, and shall also notify him promptly, in writing, of the commencement of work, suspension of work, if for a period of more than one week, resumption of work, and its completion.

(j) That if the structure or work herein authorized is not completed on or before the thirty-first day of December, 1918, this permit, if not previously revoked or specifically extended, shall cease and be null and void.

(k) That if, in the judgment of the Chief of Engineers, the said permittee does not at all times exercise due caution in the transportation of oil, gas, or other pollutive, noxious, or lethal substances, to prevent conditions deleterious to health or sea food, or hazardous to navigation, or dangerous to persons or property engaged in commerce on said waters, this permit may be revoked and all operations authorized by it may be terminated.

By authority of the Secretary of War:



D. H. CRUTCHER

Colonel, Corps of Engineers

District Engineer

1 drawing attached

ATTACHMENT VII

II. Special Conditions: (Cont'd)

h. That this permit does not authorize or approve dredging, discharge of dredge or fill material into waters of the United States, or the dumping of dredged material into ocean waters.

i. That the applicant, upon approval of a specific site by the District Engineer, accepts and agrees to comply with the terms and conditions of this permit.

j. That the permittee shall promptly comply with any future regulations or instructions affecting the work hereby authorized if and when issued in accordance with law by any department of the Federal Government for the aid or protection of aerial navigation.

k. That the permittee shall apply to Commander (oan), Eighth Coast Guard District for obstruction lights and fog signals in accordance with 33 CFR 67.

l. That when structures or other work authorized by this permit are determined by the District Engineer to have become obstructive to navigation or when the structures or other work have ceased to be used for the purpose for which they were constructed, the permittee shall remove such structures or other work, the area cleared of all obstructions and written verification thereof given to the District Engineer.

CECW-OR

MEMORANDUM FOR COMMANDERS, MAJOR SUBORDINATE COMMANDS AND
DISTRICT COMMANDS

SUBJECT: Required Special Condition of Department of the Army Permits Involving Corps of Engineers Authority Under Section 10 of the Rivers and Harbors of 1899

1. Former and current conflicts, involving Department of the Army permits for submerged structures and Corps water resources development projects, have emphasized the need for more precise wording of the conditions of Corps Section 10 permits than is provided by the standard conditions prescribed in 33 CFR Parts 320 through 330, Appendix A. It is essential that Corps permits notify the permittee that the permitted structure or other work will have to be removed, at the permittee's expense, if the Corps determines at any time after the issuance of the permit, that the authorized work interferes with, or will interfere with, navigation or any existing or future operation of the United States. Although the currently prescribed standard permit conditions may implicitly impose these obligations on the permittee, we have determined that clear and explicit notification is required in all forms of Corps of Engineers permits that provide authorization under Section 10 of the Rivers and Harbors Act, to protect the interests of the United States.

2. Effective immediately, the following special condition will be included in all Corps of Engineers permits (i.e., individual permits, letters of permission, nationwide permits, regional general permits) that provide authorization under Section 10 of the Rivers and Harbors Act, regardless whether the permit provides such authorization under Section 10 alone, or in combination with authorization under other laws:

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 Corps of Engineers, 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 on account of any such removal or alteration.

3. This memorandum will also serve as a reminder of our special obligation to furnish, to Federal agencies responsible for mapping or charting structures in navigable waters, copies of

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SUBJECT: Required Special Condition of Department of the Army Permits Involving Corps of Engineers Authority Under Section 10 of the Rivers and Harbors of 1899

permits authorizing particular kinds of work. As indicated in the regulations at 33 CFR 325.2 (a)(9):

- a. copies of permits for artificial islands, installations, or other devices on the outer continental shelf must be forwarded to the National Imagery and Mapping Agency (formerly the Defense Mapping Agency) and to the National Ocean Service;
- b. copies of permits for structures to enhance fish propagation along the coasts of the United States must be forwarded to the National Imagery and Mapping Agency, to the National Ocean Service, and to the National Marine Fisheries Service; and
- c. copies of permits involving the erection of an aerial transmission line, submerged cable, or submerged pipeline in a navigable water of the United States must be forwarded to the National Ocean Service.

4. This memorandum will serve as a further reminder that, in addition to the requirement to distribute copies of the permits mentioned in the preceding paragraph, 33 CFR Parts 320 through 330, Appendix A, provides the text of a special condition that must be included in such permits, requiring the permittee to notify the National Ocean Survey, in writing, at least two weeks before work begins, and upon completion.

5. Our Regulatory Branch P.O.C. for this action is Mr. Thaddeus Rugiel, (202) 761-0817.

FOR THE COMMANDER:

HANS A. VAN WINKLE
Major General, USA
Deputy Commander for
Civil Works