



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

SEP 27 2017

CECW-P

MEMORANDUM FOR COMMANDERS, MAJOR SUBORDINATE COMMANDS

SUBJECT: Policy Guidance Letter 44 Revisions - Relocation of Utilities at Navigation Projects Under Section 101 of the Water Resources Development Act (WRDA) of 1986, as Amended

1. Purpose. The purpose of this memorandum is to set forth current U.S. Army Corps of Engineers (Corps) policy regarding the relocation and removal of utilities located in or under navigable waters of the U.S. that interfere with Federal navigation improvements implemented under Section 101 of the Water Resources Development Act of 1986, as amended (33 U.S.C. 2211). Specifically, this memorandum modifies guidance on the interaction between Federal powers under the navigation servitude and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) and the non-Federal sponsor's performance and payment responsibilities for utility relocations. This memorandum rescinds Policy Guidance Letter No. 44, Relocations and Removals at Navigation (Harbor) Projects (20 Oct 95). It does not modify or supersede other, substantive regulations defining the scope of the Corps' authority under, and procedures implementing, Section 10 of the Rivers and Harbors Act of 1899 or other law. References to Section 101, or subsections thereof, hereafter in this memorandum shall include any amendments to such section or subsections.

2. Background. When constructing authorized Federal navigation improvements, the Corps has the power, under the Federal navigation servitude, to utilize navigable waters and lands below the ordinary or mean high water mark. This power is superior to any private property rights in the navigable waters themselves or in the underlying land. The Corps also has the power to regulate the use of navigable waters. Under Section 10, the Corps issues permits for work or structures in or affecting navigable waters. The general conditions incorporated into these permits provide that structures in, over, or under navigable waters must be relocated at no expense to the United States if required by Federal navigation interests.

Notwithstanding these Federal powers, Section 101(a)(4) expressly requires non-Federal sponsors to perform, or assure the performance of, all relocations of utilities necessary to carry out Federal navigation improvements. Utilities include all subaqueous pipelines, cables, or related facilities located in or under navigable waters of the U.S. They may be publicly or privately owned and do not have to serve the general public. The law apportions payment responsibility between the owner and the non-Federal sponsor only in the case of utility relocations necessitated by projects with an authorized depth of greater than 45 feet. For such "deep-draft utility relocations," the

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non-Federal sponsor must bear at least 50 percent of the cost of relocation. Under Section 101(a)(2), the costs borne by the non-Federal sponsor for utility relocations are credited toward the non-Federal sponsor's additional payment of 10 percent of the cost of the general navigation features.

The following paragraphs provide additional guidance on the performance and payment responsibilities for utility relocations required by Section 101(a)(4) and the interaction of these responsibilities with the exercise of Federal powers under the navigation servitude and Section 10.

3. **Utility Relocation Performance Responsibility.** The non-Federal sponsor is responsible for performing, or assuring the performance of, all utility relocations necessary for the project.
4. **Utility Relocation Payment Responsibility: General Rules.** The Federal Government is never responsible for payment of any relocation costs. As between the non-Federal sponsor and the utility owner, Section 101 does not include any provision regarding relocation cost allocation except in the case of deep-draft utility relocations. Thus, except as to deep-draft utility relocations described below in paragraph 5, whether the non-Federal sponsor owes compensation to the utility owner is determined by principles of just compensation under state law and the terms of any non-Federal permits, licenses, or rights-of-way instruments for the utility, which may alter otherwise applicable statutory or common law payment responsibilities.
5. **Utility Relocation Payment Responsibility: Exception for Payment of Utility Relocation Costs for Deep-Draft Harbors.** Section 101(a)(4) provides that in the case of a project for a deep-draft harbor, one-half of the cost of each utility relocation necessary to carry out the project shall be borne by the owner and one-half of the cost of each such utility relocation shall be borne by the non-Federal sponsor. This rule is intended to ensure that non-Federal sponsors bear at least 50 percent of the cost of deep-draft utility relocations. Whether it operates as a limitation on the non-Federal sponsor's payment obligations if state law or the terms of non-Federal permits otherwise require the non-Federal sponsor to bear a greater percentage of the relocation costs is a legal question that must be resolved by the non-Federal sponsor through negotiation with the owners or through legal proceedings.
6. **Credit for Utility Relocations.** Consistent with Section 101(a)(2), the Corps shall credit towards the non-Federal sponsor's additional 10 percent payment the costs borne by the non-Federal sponsor to perform or assure the performance of all utility relocations. For the purpose of determining the amount of credit to be afforded, the

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total cost of each relocation shall not exceed the amount the Corps determines to be necessary to provide a functionally equivalent facility. To the extent that the total amount eligible for credit under Section 101(a)(2) exceeds 10 percent of the cost of the general navigation features, the non-Federal sponsor shall not be entitled to reimbursement.

7. Navigation Servitude and Federal Section 10 Permit General Provisions. The exercise of the navigation servitude and the enforcement of general conditions in Section 10 permits are authorities exclusive to the Federal Government and therefore are within the Government's discretion. These authorities should not be exercised to overturn Congress' expressed intent about who is responsible for performing and paying for utility relocations as discussed above. In other words, these Federal authorities should not be applied in an attempt to avoid a requirement on the non-Federal sponsor's part to pay for utility relocations. Consequently, the Government should only agree to exercise its authority to compel relocations of utilities when responsibility for relocation costs, as between the non-Federal sponsor and the utility owner, is clear under state law and the terms of any applicable non-Federal permits and when the non-Federal sponsor lacks the legal capability to require owners to relocate. Exercise of Federal authorities under such circumstances would be to compel relocation only and should not determine or affect the ultimate apportionment of the relocation costs between the non-Federal sponsor and the utility owners as envisioned in Section 101(a)(4). Therefore, exercise of these Federal authorities is subject to the following conditions and requirements, which will be reviewed by the Project Manager for the Federal navigation project and coordinated with the district's Regulatory Program, Office of Counsel, and Real Estate Office:

- a. The non-Federal sponsor has made a written request that the Corps exercise the navigation servitude to compel the owner to relocate the utility;
- b. The Corps has determined that it has sufficient authority under Section 10 and the navigation servitude to compel the utility relocation;
- c. The non-Federal sponsor has made a good faith effort to negotiate with the owner for the relocation of the utility;
- d. The non-Federal sponsor has demonstrated that payment obligations for the relocation are clear under state law;

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e. The non-Federal sponsor has demonstrated that neither it nor the state has authority to require the owner to relocate the utility through eminent domain or other legal proceedings;

f. The non-Federal sponsor has obtained a letter from the state, signed by the governor or a duly authorized state official, concurring in the non-Federal sponsor's request that the Corps exercise the navigation servitude;

g. The non-Federal sponsor agrees in writing that the exercise of the navigation servitude, and revocation or modification of applicable Section 10 permits, will be at no cost to the Federal Government and will not affect the non-Federal sponsor's responsibility for payment of relocation costs under Section 101(a)(4); and

h. The non-Federal sponsor will be responsible for and pay the Corps' administrative costs, including any litigation costs, associated with exercise of the navigation servitude. The costs borne by the non-Federal sponsor will be credited towards the additional payment of 10 percent of the cost of the general navigation features.

8. Payment Responsibility for Removal of Utilities Not Requiring Replacement. There may be utilities that must be removed to construct the project but that do not need to be replaced because they are abandoned, decommissioned, or otherwise do not require replacement. If the owner has a compensable interest in the utility under state law or the terms of applicable non-Federal permits, the non-Federal sponsor, as part of its requirement to provide lands, easements, or rights-of-way necessary for the project under Section 101(a)(3), will be responsible for acquiring this interest, at no cost to the Federal Government. The non-Federal sponsor will receive credit for its costs toward its additional 10 percent cash payment.

9. Performance Responsibility for Removal of Utilities Not Requiring Replacement. The Corps will remove any utility acquired by the non-Federal sponsor during project construction, with the costs of removal shared by the Corps and the non-Federal sponsor as part of the general navigation features. If the owner has no compensable interest under state law or the terms of applicable non-Federal permits, and the owner can be located, the non-Federal sponsor is responsible for compelling removal at owner cost. If the non-Federal sponsor lacks this ability, it may request that the Corps exercise the navigation servitude to compel removal using the process described in paragraph 7. If the owner of a utility has no compensable interest under state law or the terms of non-Federal permits, and the owner cannot be located, the Corps will revoke any existing Section 10 permit and remove the utility as part of construction of the

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project with the costs of the removal shared by the Corps and the non-Federal sponsor as part of the costs of the general navigation features.

10. Projects Constructed by Non-Federal Interests. As provided in Section 101(a)(4), the cost of utility relocations are shared equally between the non-Federal sponsor and the utility owners for any project constructed by a non-Federal interests under Section 204 of WRDA 1986, as amended (33 U.S.C. 2232), regardless of the depth of such project.

11. Other Section 10 Enforcement Actions. Nothing in Section 101 or this guidance precludes a district engineer from pursuing an enforcement action against the owner of a utility in response to unauthorized activities or noncompliance with terms and conditions in a Section 10 permit (e.g., a permit condition requiring the utility to be buried at a specific depth), if such enforcement action is warranted under the provisions of Part 326 of Title 33 of the Code of Federal Regulations and is unrelated to requiring removal or relocation of the utility to facilitate construction of an authorized Federal navigation project for which a Project Partnership Agreement (PPA) has been executed.

12. Use of Corps Regulatory Program Funds. Corps Regulatory Program funds are available to process permit modifications requested by utility owners voluntarily relocating or removing their facilities. Corps Regulatory Program funds are not available to fund enforcement activities requested by non-Federal sponsors under paragraph 7 or physical removal of utilities not requiring replacement under paragraph 9. Enforcement activities requested by a non-Federal sponsor must be funded by the non-Federal sponsor in advance of the Corps' performance of the activities. Physical removal of utilities not requiring replacement during the course of construction will be treated as a cost of constructing the general navigation features and funded using funds appropriated for construction of the Federal navigation project and funds provided by the non-Federal sponsor in accordance with the cost-sharing provisions of Section 101(a)(1).



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