CECW-AA 20 Oct 95

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 or 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 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 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.

(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 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.

e. 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 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:

/s/

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US Army Corps of Engineers
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