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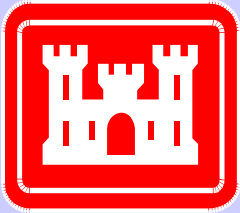


July 11, 2005

Port Administration & Legal issues Seminar

Navigation & Dredging Issues Affecting Ports

Earl H. Stockdale
Chief Counsel
U.S. Army Corps of Engineers



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TOPICS

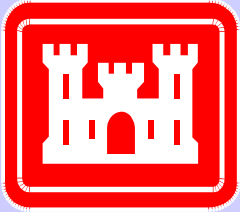
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- **Permitting Issues**
- **Overdepth Dredging**
- **Utilities Relocation & Removal**
- **Endangered Species Act**



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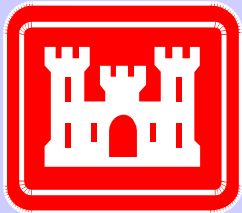


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Permit Statutes Applicable to Port Development Projects

- **Rivers and Harbors Act of 1899, Section 10**
- **Clean Water Act, Section 404**
- **Marine Protection, Research, and Sanctuaries Act, Section 103**



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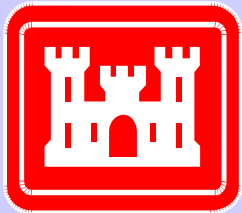


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Federal Projects

- For Congressionally authorized Federal projects, the Corps must undergo the same environmental review and prepare the same environmental documentation as a private party.
- If such documentation is prepared, the Corps does not issue itself a permit.



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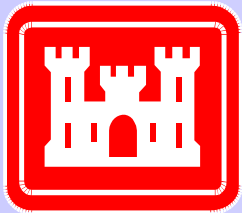


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Federal v. Non-Federal Projects

Since Corps projects must satisfy all substantive environmental requirements, the major difference between a Federal project and a private project relates to cost sharing, not the degree of environmental documentation necessary.



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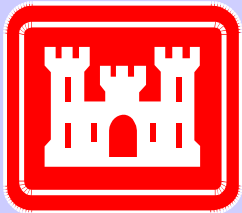
Federal v. Non-Federal Projects

- **Look to Project Authorization**

- Projects may be 100% federally funded, 100% locally funded, or cost shared.

- The Congressional authorization determines the scope of the Federal Project.

- When local sponsors perform work ancillary to a Federal Project, a Corps permit may be required.



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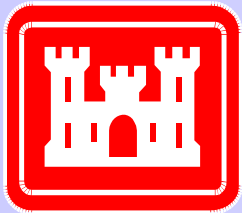


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Environmental Documentation

- Environmental review and documentation for Federal projects should include all information needed by the Corps to evaluate private permit applications for activities ancillary to the Federal project.
- This includes a complete NEPA document, ESA consultation, consideration of Historic Preservation Concerns, and water quality evaluations.
- With a complete environmental review documented in this way, the Corps' regulatory element should have all information necessary to make its permit decisions.



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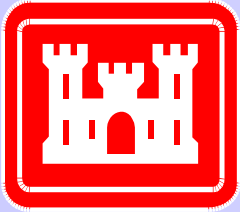
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- **There's no real advantage to "going it alone."**
- **The real advantage is working together to build and maintain our nation's waterways in an environmentally sustainable manner.**



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DREDGING

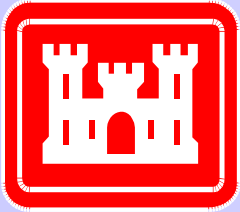
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Corps Policy

The Corps' policy is that dredging shall be accomplished in an efficient, cost effective, and environmentally acceptable manner to improve and maintain our nation's waterways.



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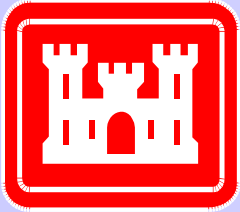


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Establishing Channel Depths

- Look to the statutory authorization to determine the Congressionally authorized channel depth.
- In order to ensure the authorized depth and to allow for inaccuracies, Division Commanders may allow dredging 2 feet below the authorized depth.
- To reduce the cost of frequent maintenance dredging in areas of significant shoaling or other special circumstances, the Corps may allow “advance maintenance dredging” to a specific depth or width.



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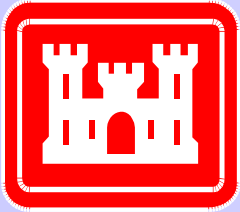


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Establishing Channel Depths

- Dredging beyond overdepth and advance maintenance levels is considered ancillary to the Federal project.
- Such additional dredging requires a federal permit and will not be cost shared.
- However, if the additional dredging is discussed in the environmental documentation, a permit can be granted on an expedited basis.



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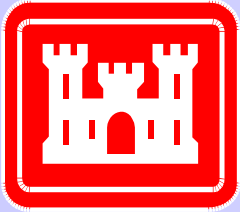


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Draft Guidance Memo

- Corps HQ has prepared and circulated a draft guidance memo that will establish procedures where we will prepare environmental documentation to address all dredging, including:
 - * allowable overdepth,
 - * advance maintenance, and
 - * non-paid overdepth dredging.
- We seek your comments on this guidance before it is issued in final form.



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Relocation & Removal of Utilities

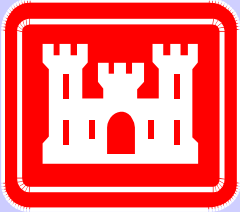
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Generally, WRDA provisions require that non-Federal interests perform, or assure the performance of, all relocations necessary for a commercial navigation harbor project.



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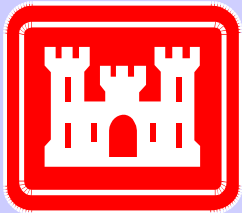
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- **Relocation of landside facilities or utilities typically have posed few problems or unique issues.**
- **Generally, relocation of these facilities is accomplished by the Sponsor providing a replacement facility to the owner.**



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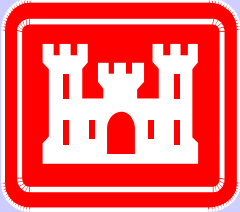


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However, when considering the relocation of pipelines or utility lines from the beds or banks of a harbor, many questions can arise including:

- who performs the relocation?
 - who pays for the relocation?
 - what is the Federal Government's role in the relocation?
- and
- how does the Federal navigation servitude or Federal and local permits impact these responsibilities?



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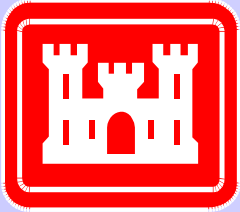
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**Policy Guidance Letter No. 44
was issued in 1995 to address
these questions in the context
of Section 101 of WRDA 86.**



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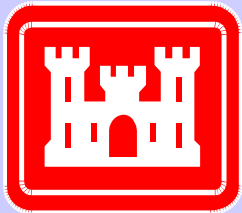
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Corps guidance makes a distinction between a ***“relocation”*** where the Sponsor must provide the facility owner with a replacement facility and a ***“removal”*** of facilities that are located on or under the bed of the harbor pursuant to Federal or local permits.



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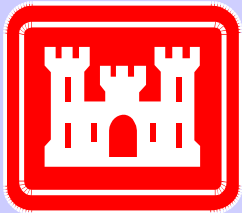
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Where a utility pipeline or other facility is located on or under the bed or banks of the harbor pursuant to permits, the Sponsor must exercise any legal capability it may have - through its permits or otherwise - to require the facility owner to remove the facility at owner cost.



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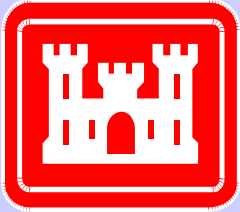
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If the non-Federal sponsor and the State do not have this capability, and after request by the Sponsor and the State, the Federal Government may exercise its rights under Applicable Section 10 permits and the Federal navigation servitude to require the owner to remove its facility at its sole cost.



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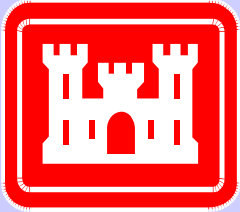


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**This removal concept has been upheld in
two cases in the Fifth Circuit:**

- 1) *Air Liquide America Corporation v. US Army Corps of Engineers*, 359 F.3d 358 (5th Cir. 2004)
and**
- 2) *United Texas Transmission Co. v. US Army Corps of Engineers*, 7 F.3d 436 (5th Cir. 1993)**



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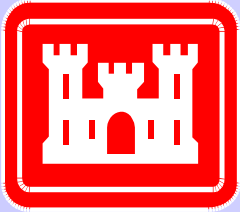
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- **For deep-draft projects, however, Section 101 and Corps guidance require the Sponsor and the owner of a utility line that must be relocated to each bear 50% of the relocation costs.**
- **Permit capability may be exercised to remove the utility line in a timely manner but the costs of relocation must still be shared between the Sponsor and utility owner.**



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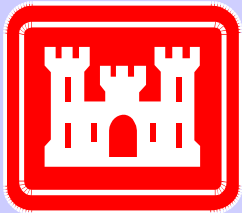
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- **We are aware of pending litigation between the Port of L.A. and Exxon/Mobil related to pipeline relocations necessary to implement the harbor deepening.**
- **At issue is whether the 3 oil pipelines that must be moved from their locations to implement the deep draft harbor work are “utilities.”**



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Relocation & Removal of Utilities

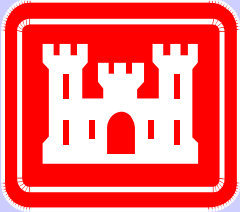
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- **If not (as the Port asserts), then the 50/50 cost sharing with the owner arguably would not apply and, reportedly, the Port could compel removal at owner cost pursuant to its permit.**
- **If so (as Exxon asserts), then the Port arguably will be responsible for 50% of the relocation costs.**



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ENDANGERED SPECIES ACT

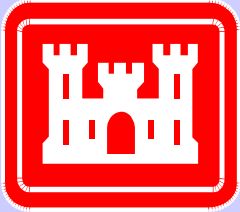
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- **ESA is an increasingly important issue in regards to port development, dredging, and navigation projects generally.**
- **ESA is impacting Corps multi-purpose operation of river systems such as the Columbia and Missouri Rivers.**



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ENDANGERED SPECIES ACT

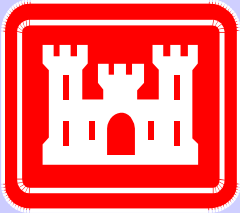
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- **The rules of the game are not settled.**
- **ESA requires that discretionary federal activities be scrutinized to ensure that they do not jeopardize endangered species.**
- **In the case of the Columbia/Snake Rivers, NOAA determined that the existence of the federal dams and the impacts from the existence of the dams was non-discretionary and should be considered as part of the “environmental baseline.”**



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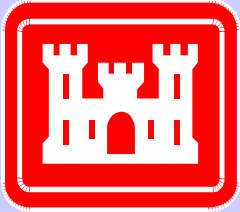
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- The U.S. District Court in Portland ordered that water be spilled over the dams instead of producing power. The Court was asked to order the lowering of reservoir levels which would have eliminated navigation, but it did not do so *at this time*. The injunction issued by the court is on appeal, and ultimately we expect the decision to be appealed on the merits.
- In another case decided within days of this decision, the U.S. District Court here in Seattle ruled that the same approach taken by NOAA in evaluating the impacts on salmon was legal and the deepening of the navigation channel from Portland to the Pacific could proceed.



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- **It is important to keep ESA issues in mind when developing port and channel operations.**
- **The Corps will work with you as we make our way through the maze of ESA compliance.**