Evaluating and Processing Road and Utility Easement Proposals on Corps Lands and Flowage Easements

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Main Purpose of this Presentation

- Describe policy and process governing new road and utility easement proposals directly affecting Federal land and flowage easements administered by USACE
- Describe USACE authority pursuant to Section 14 of the River and Harbors Appropriation Act of 1899 (better known as 33 USC 408 or Section 408)
- Briefly mention USACE authority under Section 404 of the Clean Water Act, as amended and Section 10 of the Rivers and Harbors Act of 1899. Specifics not covered in this presentation
Important Take-way

A right-of-way easement across USACE, a consent to cross USACE flowage easement, a Section 404/10 permit, and permissions granted by USACE pursuant to Section 408 are separate actions within USACE with each requiring separate written approval. Where a single action involves two or more of the above authorizations every effort is made by USACE to make the process as seamless as possible.
First, let’s talk about road and utility easements located on USACE land or flowage easements.
Fort Worth District Lakes

Map of Fort Worth District Lakes including O.C. Fisher, Hords Creek, and Grapevine.
Authorized Project Purposes

- Flood Risk Management
- Environmental Stewardship
- Recreation
- Hydropower
- Water Supply
- Navigation (Galveston, and Tulsa Districts)
Scope of Land Holdings – Fort Worth District

- 405,792 acres of land above conservation pool (in 37 counties)
- 280,147 acres of water
- 203,594 acres of flowage easement
- 66,398 acres of parks (23,219 developed)
- 64,825 acres leased to State for wildlife
- 274,569 acres managed by Corps for wildlife, open space, passive recreation aesthetics and project operations
Scope of Recreation Facilities
Fort Worth District

- 313 Parks (177 operated by Corps)
- 8366 Campsites - 3913 Picnic Sites
- 500 restrooms - 326 boat ramps
- 50 marinas with 10,000 wet/dry slips
- 600 miles of paved road
- 3050 miles of boundary line
- Numerous Trails (some national)
Natural Resources Management Mission Statement

- Manage and Conserve Natural Resources Consistent with Ecosystem Management Principles
- Provide Quality Outdoor Recreation Experiences
- To Serve the Needs of Present and Future Generations
Law, Regulations and Policy Governing Corps Easement Evaluation Process

Primary law is Title 10 U.S. Code, Subtitle A, Chapter 159, Section 2668 (grants authority)

- Easements must not be contrary to the public interest (must weigh affect on agency purpose and mission)
- No easement may be granted for more land than is necessary
- Agency may require in-kind consideration in lieu of cash payment for fair market rental value
LAW, Regulations and Policy Governing Corps Easement Evaluation Process

Other important laws to consider:
• National Environmental Policy Act (NEPA)
• Cultural Resource Laws including NAGPRA ARPA, and NHPA
• Endangered Species Act
• Fish and Wildlife Coordination Act
• 33 USC 408 (Section 408)
• River and Harbors Act of 1899 (Section 10)
• Clean Water Act (Section 404 is administered by the Corps)
Law, **REGULATIONS** and Policy Governing Corps Easement Evaluation Process

Corps Regulations Governing the Process
- ER 405 -1- 12, Real Estate Handbook, Chapter 8, Section XIV
  - Implements provisions of law
  - Discourages easements on Corps land where private lands are available
  - Provides more detailed guidance on specific types of easements
Law, REGULATIONS and Policy Governing Corps Easement Evaluation Process

- ER 1130-2-540, Environmental Stewardship Operations and Maintenance Guidance and procedures...emphasizes the importance of proper stewardship of natural resources
- ER 1130-2-550, Recreation Operations and Maintenance Policies...emphasizes the Corps role in providing public outdoor recreation opportunities. Also provides guidance for preparing and updating project Master Plans
- ER 200-2-2, Procedures for Implementing NEPA
Law, Regulations and Policy Governing Corps Easement Evaluation Process

National Corps policy on “Non-Recreational Outgrants” issued in final form March 30, 2009 and subsequently incorporated into ER 1130-2-550.

- Needed to establish consistent evaluation and decision process throughout the Corps
- Pulled together fragments of policy and guidance
- Emphasized the requirement to mitigate for lost facilities and natural resources
- Encourages establishment of utility corridors
- Defines road easement proposals that may be considered
Policy Affecting Road Easement Proposals

- Federal Land: Generally, USACE lands only made available for regional arterials and freeways (roads with controlled access, links urban areas, designed for high traffic volume at 50-65 mph, uses grade separation at all intersections, and has no median access). No viable alternative routes.
- Expansion of existing roads considered case-by-case
- Flowage easements: No net loss of flood storage, no damming effects, no isolation of homes during flood events
Project Master Plans

The Master Plan is the basic document guiding Corps of Engineers responsibilities pursuant to Federal laws to preserve, conserve, restore, maintain, manage, and develop the project lands, waters, and associated resources.

• Establishes resource use goals and objectives
• Incorporates expressed public needs and preferences
• Establishes a land classification system
The Easement Process – Four Basic Steps

STEP 1:
Proponent meets with lake personnel to describe proposal in concept. If fatal flaws exist, process stops or proponent is asked to reconsider options. Fatal flaws may include:

• Adverse effects on endangered species or cultural resources
• Adverse effects on prime facilities (dam, spillway, etc.)
• Adverse effects on highly valuable natural resources
• Major conflict with Project Master Plan
• Conflicts with other existing easements
• Request is not reasonable….viable alternatives readily available
A Potential Fatal Flaw – An Active Black-Capped Vireo Nest

Where adult perched in previous slides

Lake

Nest

To Cedar Hollow Camp Sign
90 Acre Wetland Cell - Cost Shared Environmental Restoration Project, City of Denton, Lewisville Lake
The Easement Process

STEP 2:
If no fatal flaw exists, proponent is furnished a copy of The Fort Worth District’s Requirements for Submitting Easement Requests (currently under revision).
• Proponent is asked to provide preliminary information to determine if further processing is feasible and whether or not an Environmental Assessment will be needed.
• If further processing is not feasible, process stops.
• If further processing is feasible and no EA required, proponent provides final and detailed proposal
The Easement Process

STEP 3:
If Preliminary information in step two indicates that proposal is feasible and an EA is required then:
• Corps and proponent enter into an Memorandum of Understanding setting forth respective parties responsibilities for completion of an EA and continued processing of the easement request (proponent is advised to complete EA before investing in design)
• If action is federally-funded (by USDA, FHWA, FAA, etc.) Corps may elect to become a “Cooperator” in preparation of the EA or EIS, but MOU still needed
The Easement Process

STEP 4:
• If EA results in a Finding of No Significant Impact (FONSI), then proponent may proceed with detailed design plans. Major departures from “Preferred Alternative” identified in the EA are not acceptable. Corps Real Estate personnel will initiate fair market appraisal procedures and will draft an easement instrument.
• If no FONSI is possible, the proposed action may not be feasible, may be further assessed in an Environmental Impact Statement (EIS), or may be changed to the extent that a FONSI is possible.
Crossing Flowage Easements

Crossing flowage easements is less complex than crossing Federal land. The USACE interest in flowage easements seeks to:

- Prevent human habitation
- Preserve flood storage capability and capacity
- In the case of overhead utility lines, Corps may invoke special “low sag” requirements

Normally Corps does not require an EA or MOU to cross flowage easements.
When Corps Lands or Flowage Easements are also “Jurisdictional Areas” Pursuant to Section 404 if the Clean Water Act

If an easement route across Corps lands or flowage easements crosses jurisdictional areas pursuant to Section 404 of the Clean Water Act and/or Section 10 of the River and Harbors Act expect the following:

• The 404/10 permit action and the easement action are on separate tracks but Corps strives to make the effort as seamless as possible
• Mitigation is always required for crossing Corps lands but not always required for a permit action
Mitigation

Mitigation is required for all easements and is either statutory or non-statutory. Statutory is that required by specific laws such as The Clean Water Act or as specified in a NEPA document or court decision. Non-statutory is required in the spirit of NEPA with the intent to make the Corps project whole. Minor impacts are easily mitigated by restoring the affected site. More extensive impacts usually require some form of compensatory mitigation. In extreme cases, mitigation may be achieved only by acquisition of land.
Wetlands and tree plantings completed by TxDOT and City of Grapevine as mitigation for impacts associated with road construction projects near Grapevine Lake
Costs

Costs the proponent may encounter when proposing to cross Corps lands:

• Administrative costs associated with processing an easement and completing NEPA documentation
• Fair market rental value of Corps land (may require a cash payment or in lieu consideration…generally not applicable to TxDOT)
• Mitigation costs to plant vegetation, replace recreation facilities, construct wetlands, construct fence or whatever is needed to make the Corps project whole (cannot accept cash for mitigation)
Let’s talk about Section 408 Reviews
Section 408 Overview

Authorized by Section 14 of the River and Harbors Act of 1899 (Title 33 USC 408)

Provides that the Secretary of the Army may, on recommendation of the Chief of Engineers, grant permission for the alteration of a public work so long as that alteration is not injurious to the public interest and will not impair the usefulness of the work.
Section 408 Policy Highlights

USACE Policy is set forth in EC 1165-2-216, Policy and Procedural Guidance for Processing Requests to Alter US Army Corps of Engineers Civil Works Projects Pursuant to 33 USC 408

 Defines “Alteration”:
Alterations, or alter, refers to any action by any entity other than USACE that builds upon, alters, improves, occupies, or otherwise affects the usefulness, or the structural or ecological integrity, of a USACE project. Alterations also include actions approved as “encroachments” pursuant to 33 CFR 208.10.
Additional Policy Highlights

- **USACE Jurisdictional Reach:**
  - 408 Permissions required only within the lands and real property interests acquired for the USACE project and to lands available for USACE projects under the navigation servitude. Routine O&M actions do not require 408 permissions.

- **Requester Requirements**
  - 408 requests must have written concurrence of the non-federal sponsor including acceptance of any new O&M requirements.
  - 408 projects must meet current USACE design and construction standards.

- **Decision Level Criteria:**
  - Provides clear criteria to determine if a 408 permit can be approved at District or Headquarters level.
Section 408 Take-away

- Section 408 applies to USACE-operated lakes
- Section 408 applies to local flood protection projects constructed by USACE even if USACE does not own the land (examples: Dallas Floodway, Fort Worth Floodway). Level of review is contingent on the degree to which the usefulness of the USACE project is affected.
- In general, if a proposed action is located on USACE land or flowage easement, but does not directly affect the dam, spillway, levees, switchyards, or other primary USACE-operated or constructed infrastructure, the Section 408 review of the action is minimal and is addressed concurrently with the normal steps associated with a real estate action. If primary infrastructure would be affected, an in-depth Section 408 review would be required
Points of Contact

**Easements on USACE Land and Flowage Easement**
District Office: Natural Resources and Recreation Management Section: 817-886-1577, ask for Section Chief
Lake Offices:
Go to [www.swf.usace.army.mil](http://www.swf.usace.army.mil), follow links to individual lake offices, ask for Lake Manager (see handout)

**Section 404/10 Regulatory Office**: at website above, click on “Missions”, then click on “Regulatory”.

**Section 408 Questions**: Contact Operations Division, Maintenance Branch, 817-886-1606, ask for Section 408 Manager
The End