

MEMORANDUM FOR Provost Marshal/Chief, Security, Intel & Law Enforcement (ATTN: LTC Terry Ryan)

SUBJECT: Searches of Vehicles and Persons Entering Corps Projects

1. Reference e-mail from Gary Kehoe, CENAD-SE, to LTC Terry Ryan, CECS-OS, Subject: Force Protection Status – Issue About Searches at Corps Projects.

2. Background and Purpose.

a. By e-mail dated 24 February 2003, Wendell Mah issued an opinion concerning searches and inspections of vehicles and persons entering Corps water resources development projects. This opinion concluded that Corps personnel lack authorization to conduct such searches and inspections.

b. Reference 1 e-mail requests an Office of Chief Counsel legal opinion on the same subject. This memorandum responds to that request.

3. Can Searches be Conducted? I have been informed that the Office of Chief Counsel has previously advised on this matter orally. Specifically, clients have been told that, while USACE *could* conduct searches of persons and vehicles coming onto Corps projects, USACE has, as a policy matter, elected not to. My legal analysis, which reaches the same conclusion, is set forth below.

a. As a threshold matter, the nature of Corps water resources development projects must be determined. According to the Dictionary of United States Army Terms (AD), the term “installation” includes “[l]and and any improvements permanent-affixed thereto which are *under the control of the Department of the Army and used by Army organizations.*” AR 310-25 (21 May 1986) (emphasis added). USACE water resources development projects are undoubtedly under the control of the Department of the Army and used by an Army organization. Therefore, I conclude that Corps water resources development projects are “installations” for purposes of the DoD, Army, and USACE physical security programs.

b. The DoD Physical Security Program applies to DoD component installations, which includes USACE civil works projects. DoD 5200.8-R, Para. C1.2.1. (May 1991). The program requires DoD components to develop policies and procedures for controlling access to installations. Installation commanders must define the access control measures required to safeguard facilities, including procedures for inspecting persons, property, and vehicles at installation entry and exit points. Id. at Chapter 3.

c. The Army Physical Security Program. AR 190-13 implements the DoD Physical Security Program for the Department of the Army. With respect to installation access, AR 190-22

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governs inspections and searches. Both inspections and searches are discussed below, though an entry checkpoint at a civil works facility is more properly categorized as an inspection.

(1) Searches. A search is “[a]n examination, authorized by law, of a specific person, property, or area for specified property or evidence[.]” AR 190-22, Glossary, Section II (1 January 1983). The 4th Amendment to the United States Constitution requires that searches be reasonable, which generally means pursuant to a warrant issued upon probable cause. However, warrantless searches and searches founded upon less than probable cause are permissible under certain circumstances.

(a) Consent Searches. A search may be conducted without a warrant and without probable cause if the subject of the search consents to the search. Consent must be freely and voluntarily given in order to be valid. E.g., Ohio v. Robinette, 519 U.S. 33 (1996). Therefore, to conduct consent searches at civil works project entry points, appropriate signage should be posted indicating that consent to search is a precondition to entry upon the project. Those who choose not to consent can simply turn away.

(b) Restricted Area Searches. Commanders of Army installations may also designate restricted areas to safeguard property for which they are responsible. AR 190-13, Para 6-3.a. (30 September 1993). Except in limited circumstances, restricted areas must be marked according to AR 190-13, Para. 6-4.c. The prescribed signage states that persons and vehicles entering the restricted area are subject to search. That is, warrantless searches of persons and vehicles entering restricted areas are conducted under a consent theory.

(2) Inspections. An inspection is “[a]n examination of the whole or part of a...vehicle, including entrance and exit points, conducted as an incident of command. The primary purpose is to...insure that security...is maintained.” AR 190-22, Glossary, Section II. Inspections need not be founded on probable cause, though they generally must be consented to by the subject of the inspection. Further, they must be conducted pursuant to and within the scope of statutory or regulatory authority, and they may not be used as a pretext for warrantless searches based on less than probable cause. AR 190-22, Para. 2-4. Typically, the need to inspect is great and the personal intrusion minimal, such as passing through a metal detector in an airport. As part of the commander’s inherent authority, entry inspections, including inspections of glove compartments and trunks, could be conducted at civil works projects. Consent can be obtained through signage similar to that used for consent and restricted area searches.

d. Consistent with AR 190-13, the method of protecting Corps civil works facilities is left to the discretion of the Division Commander. ER 190-1-50, Para. 5.b.(4) (30 November 1987). While a Division Commander *could* choose to impose entry searches or inspections consistent with the above guidelines, it is my understanding that this has not been done. Further, it appears

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that, as a policy matter, USACE frowns upon such a posture. E.g. ER 1130-2-550 (15 November 1996) (“The protection of facilities...shall always be secondary to the safety of Corps personnel, contract employees and visitors...In no case shall this enforcement portray an aggressive law enforcement image.”). I am not aware of any authoritative USACE guidance adopting or outlining a different policy published after 11 September 2001.

4. Who May Conduct Searches and Inspections?

a. Searches. USACE park rangers are *not* “law enforcement officers” as that term is defined in Title 5 of the United States Code. E.g., 5 U.S.C. §§ 5541, 8331(20), 8401(17) (2003). Rather, they are “regulation enforcer[s] with full citation authority of Title 36[, Code of Federal Regulations].” Id. at Para. 6-1.c. Park rangers do not possess the authority to enforce state and local laws; this authority remains with state and local law enforcement, since USACE takes only a proprietary interest in civil works areas. Id. Due to the nature of a search (seeking specific property or evidence), an individual without law enforcement authority should not conduct a search.

b. Inspections.

(1) It is not necessary, however, to be a law enforcement officer in order to conduct an inspection. As discussed above, inspections merely need to be founded on and within the scope of specific statutory or regulatory authority. Entry *inspections* at Corps projects are permissible as a matter of inherent command authority, and therefore may be conducted by USACE park rangers or other personnel after undergoing appropriate training. ER 190-1-50, Para. 5.e. Once again, however, USACE has made a policy decision to forbid rangers from conducting *searches*. ER 1130-2-550, Para. 6-2.e.(1).

(2) Though USACE park rangers and other properly trained personnel could conduct entry inspections absent the contrary Engineer Regulation, their authority beyond these inspections is severely limited. Rangers and other personnel may not detain, arrest, or seize persons or property. Id. Therefore, their recourse is limited to denying access to the project and notifying the appropriate state or local law enforcement authority. E.g., ER 190-1-50, Para. 7.a.

(3) Further, any properly trained contract security guard could also conduct an entry inspection at a Corps civil works facility. As with USACE rangers, these personnel could only deny entry and notify the appropriate law enforcement authority if they detect something amiss during the course of an entry inspection.

5. Conclusion. USACE can conduct entry searches or inspections of persons and vehicles entering water resources development projects. As I understand it, what USACE desires to

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implement is more properly characterized as an inspection than a search. These inspections should be consented to (e.g., appropriate signage must be posted indicating that persons coming onto the project consent to inspection of their persons and vehicles). Any properly trained USACE park ranger, employee, or contract security guard may conduct inspections. In the event that the inspection uncovers something amiss, the inspector's recourse is limited to denial of entry and notification of state and local law enforcement personnel. If USACE desires to impose an entry search, as opposed to an entry inspection, an individual with law enforcement authority must be used. However, it appears that USACE has determined, as a matter of policy, that entry inspections or searches should not be conducted at civil works sites.

6. POC for this memorandum is the undersigned, (202) 761-4931, scott.felder@usace.army.mil.

/s/

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