



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
WASHINGTON DC 20314-1000

CECC-G

21 NOV 11

MEMORANDUM FOR CECW-CO

SUBJECT: Construction by Non-Federal Entities at USACE Civil Works Properties

1. Purpose. This memorandum is to follow up on our discussions regarding USACE's authority to permit a non-Federal entity (NFE) to perform construction at a USACE water resources development project.

2. Discussion.

a. 16 U.S.C. § 460d is the statutory authority under which USACE may permit an NFE to perform voluntary construction at a USACE water resources development project. Please note that this is a separate and distinct authority from 33 U.S.C. §§ 2325 and 2328, which permit USACE to accept contributions of "funds, materials, and services" from NFEs.

b. As a strictly legal matter, USACE is *not* required to execute any form of real estate instrument with, or grant any type of real estate interest to, the NFE before USACE may permit the NFE to perform construction on USACE property under 16 U.S.C. § 460d. This is because the authority to permit NFE construction under § 460d is textually distinct and separate from the leasing authority conferred under § 460d, indicating that the real estate requirements applicable to the later-conferred leasing authority do not apply to the earlier-conferred construction authority. See 16 U.S.C. § 460d ("The Chief of Engineers, under the supervision of the Secretary of the Army, is authorized . . . to permit the construction of [] facilities by local interests . . . The Secretary of the Army *is also authorized* to grant leases of lands . . .").

c. We recommend that CECW execute a Memorandum for Record or amend the applicable Engineer Regulation to clearly state that 16 U.S.C. § 460d is the authority under which NFEs may perform construction on USACE properties. This both guarantees that CECW personnel are aware of the authority under which NFE construction is performed, and provides a record by which USACE will know which programs would be affected if Congress were to ever amend 16 U.S.C. § 460d.

3. If you have any questions or concerns, POC for this memorandum is the undersigned, available at (202) 761-8561.

/s/

STEPHAN D. RICE
CPT, JA