

# DISPOSITION FORM

For use of this form, see AR 340-13; the proponent agency is The Adjutant General's Office.

|  |  |               |       |
|--|--|---------------|-------|
| REFERENCE OR OFFICE SYMBOL<br><br>DAEN-GCC | SUBJECT<br>Authority to Implement the Lakeshore Management Program |               |       |
| TO DAEN-CWO-R                              | FROM DAEN-GCZ-A  | DATE 2 Sep 76 | CMT 1 |
| TURNER/pat/37053                           |  |               |       |

1. This is in reply to your request for my review of the applicable authorities governing the administration of the Corps of Engineers' Lakeshore Management Program promulgated under 36 CFR 327.30.
2. The general authority governing this program is found in Section 4 of the Flood Control Act of 1944, as amended (16 U.S.C. 460d), and as supplemented by specific project authorizations, the Federal Water Project Recreation Act of 1965 (P.L. 89-72), the Fish and Wildlife Coordination Act (P.L. 85-624), the National Environmental Policy Act of 1969 (P.L. 91-190), the Federal Water Pollution Control Act Amendments of 1972 (P. L. 92-500), and the Act of 31 August 1951 (31 U.S.C. 483a).
3. Section 4 of the Flood Control Act of 1944, as amended, is a broad grant of general authority permitting "The Chief of Engineers, under the supervision of the Secretary of the Army... to construct, maintain and operate public park and recreational facilities at water resource development projects under the control of the Department of the Army, to permit the construction of such facilities by local interests ..., and to permit the maintenance and operation of such facilities by local interests." This section also permits the Chief of Engineers to lease Federal lands at these projects to local non-Federal sponsors for the development and administration of public park areas. Finally, this Section contains authority for the Corps of Engineers to administer and manage the project's Lakeshore and Water areas in the public interest. This grant of authority reads as follows:

"The water areas of all such projects shall be open to public use generally for boating, swimming, bathing, fishing and other recreational purposes, and ready access to and exit from such areas along the shores of such projects shall be maintained for general public use, when such use is determined by the Secretary of the Army not to be contrary to the public interest, all under such rules and regulations as the Secretary of the Army may deem necessary, including but not limited to prohibitions of dumping and unauthorized disposal in any manner of refuse, garbage, rubbish, trash, debris, litter of any kind at such water resource development projects, either into the waters of such projects or onto any land federally owned and administered by the Chief of Engineers."
4. This particularly broad grant of authority was enacted to give the Chief of Engineers full and adequate authority to regulate and administer its projects, including the shorelands and open water areas, for the purpose of promoting the full recreational benefits which the 1944 Flood Control Act permitted the Corps to consider in connection with the development of its multiple-purpose dam and reservoir projects.

2 Sep 76

SUBJECT: Authority to Implement the Lakeshore Management Program

1944 recreation, at these Corps' water resource project areas was only then being fully recognized as an authorized Federal project purpose, and little or no legislative history is available to interpret the intent of Congress, outside of the language of the law itself. Nevertheless, we find that it was fully intended to be the purpose of this law to make the recreation and conservation values of these projects fully available to the public both from an administrative and a financial view point (See, House Report No. 1309, accompanying H. R. 4485, 78th Congress, and dated March 29, 1944, at page 6). Section 207 of the Flood Control Act of 1962 (P.L. 87-874) enlarged this management and development authority to projects other than dams and reservoirs. This enactment was undertaken in full recognition of the authority and responsibility of the Corps of Engineers to provide recreational areas and to manage all of its projects to provide for the safety and convenience of the public, in the same manner as the Federal Government then provided for public use at reservoir projects. (See, Senate Report No. 2258, accompanying S3773, 87th Congress, dated October 1, 1962, at page 318). Finally, Section 234 of the Flood Control Act of 1970 amended Section 4 to provide for an effective refuse and litter removal campaign in the body of those regulations authorized to be promulgated for the management and utilization of the Federal lands and waters at these Federal project areas. (See Conference Report No. 91-1782, accompanying HR 19877, 91st Congress, and dated December 17, 1970, at page 29).

5. Throughout the 32 years of this statute's existence no judicial suit has ever been entertained attacking the Corps' administration of this authority. Accordingly, no judicial decisions have ever been reached restricting the clear mandate given the Chief of Engineers to manage and regulate the use of the Federal public lands and water areas in the public interest. Accordingly, we believe that Section 4 of the 1944 Flood Control Act, as amended, provides a clear mandate to regulate the use of the Federal project shorelands and water areas in the public interest.

6. In addition to the general authority discussed above, specific legislative authorizations providing for the planning, development, management and administration of the recreation and fish and wildlife resources at individual water resources development projects exists and these provide the basic authority for the administration and management of the lakeshores and open waters of the individual project.

7. Other Federal legislation also exists to require the Corps of Engineers, and other Federal agencies, to consider the impact of their land management programs on the environmental, fish and wildlife, and recreational resources of those Federal areas under their control and jurisdiction. Thus, the Federal Water Project Recreation Act of 1965 (Public Law 89-72) requires that "full consideration shall be given to the opportunities ... for outdoor recreation and for fish and wildlife enhancement..." at those projects under the control and jurisdiction of the Department of the Army.

8. Section 2 of the Fish and Wildlife Coordination Act (Public Law 85-624) requires that "wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs through the effectual and harmonious planning, development, maintenance, and coordination of wildlife conservation and rehabilitation," at all Federal projects for water resources development.

SUBJECT: Authority to Implement the Lakeshore Management Program

Finally, the National Environmental Policy Act of 1969 (Public Law 91-190) requires all Federal agencies "to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. All programs administered by the Corps of Engineers are required by Section 102 of this Act to be administered in accordance with this policy.

10. Section 4 of the 1944 Flood Control Act in conjunction with the Act of August 31, 1951 (31 U.S.C. 483a) authorizes the Corps to charge fees in conjunction with the administration of the Lakeshore Management Program. These fees are intended only to cover the expenses involved in administering the program and are permitted by these statutes.

11. We believe that these provisions of law, which require the Corps of Engineers to protect public use, promote recreational opportunities and ready public access, and to preserve and protect the environmental and fish and wildlife resources at its water resources development projects, grant sufficient authority to the Secretary of the Army, acting through the Chief of Engineers, to promulgate general rules for the management and administration of the project lands and waters, for their use by the general public.

12. Regulating the exclusion and limitation of private exclusive uses of the public shoreline and open water areas clearly falls within these Federal authorizations. Permission has been granted in the past, and to a more limited extent under the present regulations, for the placement of private docks, piers, and other floating recreation structures in these public areas by adjacent land owners. Such permission, however, has always been granted on a revocable basis. The owners of those structures permitted to be placed on the public land or in the public waters have no vested property right in the continued placement of these structures in these areas. Hence, there is no legally cognizable claim for the alleged diminution of property values resulting from any action by the Corps of Engineers to restrict or revoke its permission in the public interest.

13. Since the adjacent landowners have no property right in the continued placement of their private facilities on the public lands and waters, they presumably cannot assess a value on their permitted structure when they sell their property. Any assertions made as to their right to the continued use of these facilities in the public lands and waters in the course of selling their property may, in fact, leave the sellers and their agents vulnerable to charges of fraud in the conduct of their transactions.

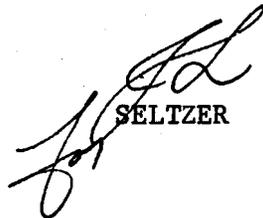
14. In conclusion, we believe that the regulations for Lakeshore Management promulgated in 36 CFR 327.30 clearly fall within the scope of the authorities discussed above. Furthermore, the restriction or revocation of the permission to construct and utilize private exclusive use facilities on the Federal public shorelands

EN-GCC

2 Sep 76

SUBJECT: Authority to Implement the Lakeshore Management Program

and water areas clearly fall with the broad mandate granted by the Congress to the Corps of Engineers to regulate these and other uses of the public shoreline in the public interest.

  
SELTZER