



US Army Corps
Of Engineers
Wilmington District

PUBLIC NOTICE

Issue Date: 21 January 2005
Comment Deadline: 22 February 2005

All interested parties are hereby advised that the Wilmington District, Corps of Engineers (Corps) proposed a Commander's Policy Memorandum regarding "Construction and Modification of Enclosed Structures over Navigable Waters in North Carolina". Specific information is described below and shown on the attached draft policy. This Public Notice and the attached draft policy are also available on the Wilmington District Web Site at www.saw.usace.army.mil/wetlands

Authority: Section 10 Rivers and Harbors Act of 1899 and/or Section 404 of the Clean Water Act.

The Corps will decide whether to issue, conditionally issue, or not issue the proposed policy pursuant to applicable procedures of Section 10 of the Rivers and Harbors Act of 1899 and/or Section 404 of the Clean Water Act..

Existing Condition: Wilmington District has for some time regulated structures over waters as described in the draft policy. This public notice and proposed Commander's Policy Memorandum is being provided for public review and comment.

Evaluation

The decision whether to issue a Commander's Policy Memorandum will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed policy on the public interest. That decision will reflect the national concern for both protection and utilization of important resources. The benefit which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered including the cumulative effects thereof; among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, flood plain values (in accordance with Executive Order 11988), land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership, and, in general, the needs and welfare of the people. Application for activities not in agreement with this policy would still be reviewed under our Individual Permit process. However, the basis for our evaluation would be based on any issued Commander's Policy Memorandum. For activities involving the discharge of dredged or fill materials in waters of the United States, the

evaluation of the impact of the activity on the public interest will include application of the Environmental Protection Agency's 404(b)(1) guidelines.

Commenting Information

The Corps is soliciting comments from the public; Federal, State and local agencies and officials; Indian Tribes and other interested parties in order to consider and evaluate the impacts of this proposed policy. Any comments received will be considered by the Corps to determine whether to issue, modify, condition or not issue a Commander's Policy Memorandum. To make this decision, comments are used to assess impacts on endangered species, historic properties, water quality, general environmental effects and the other public interest factors listed above. Comments are used to determine the need for a public hearing and to determine the overall public interest of the proposed policy.

Any person may request, in writing, within the comment period specified in this notice, that a public hearing be held to consider the policy. Requests for public hearings shall state, with particularity, the reasons for holding a public hearing. Requests for a public hearing shall be granted, unless the District Engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing.

Written comments pertinent to the proposed work, as outlined above, will be received by the Corps of Engineers, Wilmington District, until 5pm, February 22, 2005. Comments should be submitted to Keith A. Harris, P.O. Box 1890, Wilmington, North Carolina 28402-1890. Mr. Harris can be reached at (910) 251-4631 for further information.

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MEMORANDUM FOR DISTRIBUTION-B

SUBJECT: Commander's Policy Memorandum ## - Construction and Modification of Enclosed Structures over Navigable Waters in North Carolina

1. Purpose. It is the intent of this memorandum to provide general policy and guidance to assist the District in evaluating proposals to construct new enclosed structures and to modify existing enclosed structures over navigable waters in North Carolina.

2. Applicability. It is the District Commander's responsibility to protect Federal interests regarding navigable waters within North Carolina. State rules and interpretations governing the construction of new enclosed structures and the modification of existing enclosed structures over navigable waters may not be adequate in protecting Federal navigation interests.

3. Definitions. The District recognizes the difference between enclosed structures and unenclosed structures as follows:

a. Examples of unenclosed structures include piers, docks, and wharves. These structures provide access to navigable waters for traditional uses (e.g., boating, fishing, swimming, and commerce). Roofs are often constructed over these structures to protect from the rain and sun. Due to the open nature of these structures, they are less susceptible to damage by storm surge and high winds, and if they are damaged, release much less debris. The District generally recognized these water-dependent structures as acceptable, and routinely permit them in North Carolina via Regional General Permits.

b. Examples of enclosed structures include houses, townhouses and condominiums, restaurants, businesses, museums, hotels, etc., or enclosed structures that can easily be converted to such use. These structures are not water-dependent and are extremely vulnerable to the forces of storm surge and high winds.

4. General. Corps of Engineers regulations, as well as Federal case law, consider protection of navigation to be a primary concern of the Federal government. Although the U.S. Coast Guard has a parallel responsibility and the State of North Carolina has an interest and responsibility with regards to navigable waters of the State, the District Commander's authority and responsibility for navigable waters of the United States is not subordinate to the State's decisions regarding navigation issues.

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a. The District has much experience with existing, enclosed structures over navigable waters that are either not maintained, or are damaged by strong winds or storm event(s). All structures over the water are extremely vulnerable to the elements, particularly those with rigid sides that present a large surface area susceptible to the battering of waves or high winds. Damage to enclosed structures results in the release of not only wooden and man-made building debris into navigable waters, but also the contents of those structures (e.g., furnishings, stoves, washing machines, dishwaters, etc). This type of mobile debris represents a long-term hazard to navigation, threatening boating interests for years after the structure fails.

b. The District also holds the position that a proliferation of enclosed structures within navigable waters is likely to lead to adverse environmental effects. It is the experience of the District that the construction of enclosed structures also includes the installation of utilities (e.g., electricity, water, gas, and sewage). The potential for leakage of waste and household/commercial chemicals into navigable waters is a strong possibility and would result in adverse impacts to water quality and the aquatic environment.

c. Waterfront property is extremely valuable and an increasingly rare commodity in North Carolina. This has lead to increased pressure to build enclosed structures on pilings over navigable waters. The District continues to field numerous requests to construct homes, restaurants, visitor's booths, offices, apartments and condominiums, museums and hotels on pilings over navigable waters in North Carolina. The District has also experienced numerous requests for modification and/or expansion of existing enclosed structures over navigable waters. Based on the factors described above, the District maintains that these types of non-water dependent structures should not be constructed over navigable waters in North Carolina.

5. Policy. New structures proposed to be built within navigable waters in North Carolina for non-water dependent purposes must be limited to pile supported, single story, unenclosed decks and boardwalks. Modification of existing enclosed structures within navigable waters in North Carolina for non-water dependent purposes must be limited to work within the existing footprint of the structure and must not include expansion of any additional enclosed area over navigable waters. These structures must also meet the following criteria:

a. The proposed development must be consistent with all Federal laws, policies and guidelines.

b. The proposed development must be consistent with all local and State laws, policies and guidelines.

c. Roofs may be constructed over the structures, however, enclosing partitions, plastic sheeting, screening, netting, lattice or solid walls of any kind are not allowed.

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- d. Construction of such structures must not require the excavation or filling of wetlands or navigable waters.
- e. Structures for non- water dependent/ non-traditional purposes shall not extend more than 20 feet waterward of the normal high water level in non-tidal waters, or mean high tide line in tidal waters.
- f. Structures must be elevated over wetlands so as not to restrict the flows and circulation patterns of waters of the United States, nor degrade or destroy aquatic function.
- g. Structures shall not interfere with access to riparian property.
- h. Structures must be consistent with Commander's Policy Memorandum #5 – *Setbacks Along Federally Authorized Waterways*.
- i. Structures shall not jeopardize the existence of a threatened or endangered species, or its designated critical habitat.
- j. Structures shall have no adverse effect on essential fish habitat;
- k. Structures shall not affect historic properties listed, or eligible for listing, in the National Register of Historic Places.
- l. Structures shall have no adverse effect on water quality or adjacent wetlands, and must meet a reasonable alternative analysis for upland development;
- m. Structures shall not pose a threat to navigation.
- n. Modification of existing enclosed structures must not result in a change in use (conversion of a storage shed to a residence or a restaurant).
- o. Modification of existing enclosed structures must not result in a substantial change in occupancy (conversion of a house to a restaurant or a multi-family development).

6. Procedure.

- a. Requests for the construction of new enclosed structures and/or modifications to existing enclosed structures for non-water dependent purposes over navigable waters will be evaluated on a case-by-case basis through the Individual Permit Process.
- b. All requests for the construction of structures on U.S. Army Corps of Engineers easement lands will be coordinated with the Real Estate Division (CESAS-RE, Savannah District).

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c. All requests for the construction or modification of structures within or adjacent to the Atlantic Intracoastal Waterway and other Federally authorized waterways will be coordinated with the Navigation Branch (OP-N).

CHARLES R. ALEXANDER, JR.
Colonel, EN
Commanding