



DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CECC-ZA

5 April 2001

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: The Importance of Preventive Law in the Execution of Corps Programs -- The Role of Legal Review and Resolution of Non-Concurrences

1. At this critical juncture in the history of the Corps, I want to emphasize the role of legal review in the efficient development and execution of vital Corps programs. Not only projects, but also national policies, have in the past been delayed or disrupted because thorough and timely legal review was not sought.
2. The United States Constitution, treaties, statutes, and regulations provide the fabric that structures and controls the execution of governmental work in our democracy. Validly promulgated regulations have the force and effect of law. As a government of limited powers, we are authorized to act in accordance with the provisions of law in the furtherance of public interests. Private entities are authorized to do anything not prohibited by law. In this key aspect, government work and private sector business are very different. Respect for the law ultimately pays huge dividends in both effectiveness and efficiency. More importantly, adherence to the law is the right thing to do.
3. In my empowerment to all Corps employees, I have emphasized the importance of determining that actions are both ethical and legal before proceeding. Practicing preventive law through early legal involvement or review shortens the time necessary to complete a project and often avoids costly and time-consuming legal challenges. Where legal challenges cannot be avoided, sound legal review and advice greatly increase the probability that Corps programmatic and policy positions will prevail in court with a minimum of program disruption.
4. If legal review results in a non-concurrence, whether in writing or otherwise, it is incumbent on the program official or other client to obtain resolution of that non-concurrence before proceeding. Non-concurrences that cannot be resolved require elevation of the issue within the client's chain of command and within the legal services chain.
5. Elevation of issues ensures not only that individual officials do not incur criminal and civil liability, but also alerts the next higher level in the chain of command of the existence of problems. It allows higher level management to make judgments, along with Counsel, about the appropriate amount of litigation and programmatic risk that is acceptable in any given situation.

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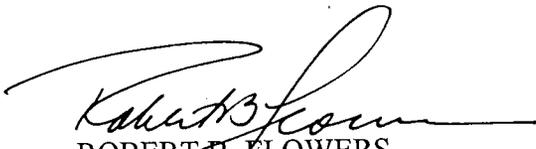
6. I have discussed the principles contained in this memorandum with the Corps' Chief Counsel, Robert M. Andersen. Throughout his service with the government, he has always emphasized how important it is for attorneys to diligently search for legal ways for clients to achieve their goals. In short, he insists that Corps attorneys be responsive to their clients objectives. In some instances, however, a non-concurrence is the only appropriate and legal answer. I ask you to consider the words of General Douglas MacArthur reflecting on his years of involvement with the Corps both on the military and civil side:

“The Corps' fame is not the Panama Canal, the Washington Monument, the gigantic dams on the Missouri, flood protection and navigation on the Lower Mississippi and the Ohio, the wonder of its modern air base construction, and the like. What the Corps is most famous for is its ability to say “No” when “No” should be said.”

7. Resolution of legal non-concurrences is not optional. It is a sound business practice and is consistent with my philosophy in accomplishing work.

8. Naturally, the earlier that Counsel is involved, the easier it is to resolve issues as they develop. Both the Chief Counsel and I support team building between attorneys and their clients at all levels throughout the Corps of Engineers.

9. I urge each Headquarters, Division, District, Center and Field Operating Activity Counsel to engage their Commander and clients in discussions of the importance of the principles contained in this guidance. There is always time to go back and spend resources to undo mistakes, therefore, there should be time to do it right in the first place.


ROBERT B. FLOWERS
Lieutenant General, USA
Commanding

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