REPORT TO THE CONGRESS

Need To Improve Procedures For Compensating Municipalities For Relocation Of Facilities Necessitated By Construction Of Federal Water Resources Projects

B-160628

Corps of Engineers (Civil Functions)

Department of the Army

BY THE COMPTROLLER GENERAL OF THE UNITED STATES

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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To the President of the Senate and the
Speaker of the House of Representatives

The accompanying report presents our findings and recommendations regarding the need for the Corps of Engineers (Civil Functions), Department of the Army, to improve its procedures for determining the compensation to be paid to municipalities for the relocation of facilities, such as streets, sidewalks, and water and sewer systems, necessitated by the construction of Federal water resources projects.

We found that, in acquiring the facilities owned by six municipalities, the Corps of Engineers had provided compensation for replacements, which exceeded the Government's legal obligation. We are not recommending that the Corps attempt to recover the funds expended because the municipalities entered into the relocation agreements in good faith.

In compensating four of the six municipalities for the relocation of facilities, the Corps' district offices, in order to allow for such factors as future expansion and latitude in lot selections, had been following a practice of providing facilities to serve lots which were excess to those required for the residents who had expressed a desire, in a poll, to move to the relocation area. We were advised, however, that the Office of the Chief of Engineers had been approving--as a matter of general practice--additional facilities to allow a contingency for those people who, subsequent to the poll, changed their minds and decided to relocate to the new site.

This practice resulted in the Corps' providing an average of 34 percent more facilities than those which we believe were required to fulfill the Government's legal obligation to the four municipalities and increased the cost of these relocations by about $367,000. In our opinion, this practice constitutes a payment for indirect and speculative damages, which is prohibited by law.

Therefore, we proposed that existing instructions be revised to require that, when replacement facilities are necessary for relocating

residents, no facilities be provided beyond those necessary to serve eligible residents who have indicated their intent to move to the relocation area.

The Department of the Army stated that the existing procedures would be changed to apply a contingency or judgment factor not to exceed 10 percent more facilities than initial surveys show are required and that this change should serve to reduce the scope of replacement facilities in the initial planning stage.

We believe that the use of a contingency in determining the replacement facilities to be provided at a relocation site is inappropriate for the following reason. In any poll there is an inherent judgment factor and the inclusion of a contingency serves only to compound the potential for error in the amount of municipal facilities that the Government should provide to meet the requirements of the law.

We remain of the opinion that payment allowing for any contingency constitutes compensation for indirect and speculative damages, which is prohibited by law. Therefore, we are restating our proposal as a recommendation to the Secretary of the Army.

The Federal courts have held in cases relating to municipal relocations that, where it can be shown that there is no necessity for substitute roads or utility systems or portions thereof, the Federal Government is required to pay only nominal consideration.

We believe that the municipal facilities constructed to serve the relocation areas at the two remaining municipalities were not necessary. The Government incurred costs of about $412,000 for the construction of these facilities.

We believe that in both cases there was sufficient evidence available to the Corps, before it entered into the relocation contracts, to warrant determinations (1) that the replacement facilities were not necessary and (2) that the Government was liable for only nominal

consideration for the acquisition of the municipal facilities. Both towns had sufficient lots in areas not acquired by the Corps to accommodate all residents who had indicated an intent to move to the relocation area. Also, for one town, a substantial time had elapsed between the time the residents in the area to be taken by the Corps were polled as to their relocation requirements and the date the relocation agreement was signed, at which time many of the residents had already resettled in other locations.

We proposed that the Chief of Engineers issue instructions requiring that, when a substantial time has elapsed since a poll has been taken of the eligible relocatees to determine their intent to move to the relocation site, a second poll be taken and a reevaluation made as to the need for the replacement facilities before entering into a relocation agreement with the municipality. Instructions were issued substantially in accordance with our proposal.

We found that the evidence considered by district offices in determining the Government's legal obligation to provide replacement facilities had been limited to that which supported the need for relocation. We therefore proposed to the Department of the Army that the Chief of Engineers require district offices to consider and evaluate evidence that replacement facilities may not be needed and to include the evaluation of this evidence in a written determination of the Government's legal liability arising from the acquisition of the municipal facilities. The Department did not comment on this proposal.

Therefore, we are restating our proposal as a recommendation, and, in addition, we are recommending that, in its evaluation, the Corps consider information relating to (1) the availability of lots in the areas of the municipality not taken by the Corps and (2) the alternatives to providing replacement facilities.

We are reporting this matter to the Congress because the cost of relocation is a significant item in many Federal water resources projects and because we believe that implementation of our recommendations will result in reduced costs of future relocations.

Copies of this report are being sent to the Director, Bureau of the Budget; the Secretary of Defense; and the Secretary of the Army.

Comptroller General
of the United States

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REPORT ON

NEED TO IMPROVE PROCEDURES FOR COMPENSATING MUNICIPALITIES FOR RELOCATION OF FACILITIES NECESSITATED BY CONSTRUCTION OF FEDERAL WATER RESOURCES PROJECTS

CORPS OF ENGINEERS (CIVIL FUNCTIONS)

INTRODUCTION

The General Accounting Office has made a review of the policies and procedures of the Corps of Engineers (Civil Functions), Department of the Army, which relate to the compensation paid to municipalities for the relocation of facilities necessitated by the construction of Federal water resources projects. Our review was made pursuant to the Budget and Accounting Act, 1921 (31 U.S.C. 53), and the Accounting and Auditing Act of 1950 (31 U.S.C. 67).

The objectives of our review were to examine into the reasonableness of the Corps' payments to municipalities for relocations of facilities and to ascertain whether such payments were in accordance with applicable provisions of law.

For the purposes of our review, we selected one project from each of three Corps division offices which, in total, incur about one half of the Corps' expenditures for civil works projects under construction at the time of our review. It should be noted that not all construction projects involve municipal relocations and that not all municipal relocations are as extensive as those we reviewed.

Our review included a detailed examination into the relocation of municipal facilities at Eddyville and Kuttawa, Kentucky, under the Barkley Reservoir project; Eufaula, Oklahoma, under the Eufaula Reservoir project; and Arlington, Boardman, and Umatilla, Oregon, under the John Day Reservoir project. The Government incurred costs of about $9 million for the relocation of municipal facilities for these six towns. (See app. II.)

Our review was directed to an evaluation of those matters which appeared to need attention and included an examination of applicable legislation, design memorandums, contract drawings and specifications, cost and quantity estimates, relocation agreements between the Corps of Engineers and the six municipalities, reports by independent consultants, and other pertinent documents. We also held discussions with appropriate officials of the Corps and the municipalities and examined pertinent records of the municipalities.

We did not attempt, during this examination, to evaluate the Corps' policies and procedures for other types of relocations, such as highways and railroads. Further, we did not examine into the Corps acquisition of private property located within the municipalities, which is acquired through negotiations directly with the private property owners. The owners are paid the fair market value of the property (land and buildings) and are compensated for their moving expenses.

Our review was conducted at the Office of the Chief of Engineers in Washington, D.C.; the Corps division offices in Cincinnati, Ohio, Dallas, Texas, and Portland, Oregon; and the Corps district offices in Nashville, Tennessee, Tulsa, Oklahoma, and Walla Walla, Washington.

The principal management officials of the Department of Defense and the Department of the Army responsible for the administration of the activities discussed in this report are listed in appendix I.

BACKGROUND

The Secretary of the Army is authorized and directed by the Flood Control Act of June 28, 1938 (33 U.S.C. 701 c-1), to acquire, in the name of the United States, title to all lands necessary for any dam and reservoir project for flood control with funds appropriated or made available for such projects, provided that no reimbursement be made for any indirect or speculative damages. The act authorizing the construction of individual projects provides the authority to effect the relocation of municipal facilities.

The preclusion against reimbursement of indirect or speculative damages, set forth in 33 U.S.C. 701 c-1, is a restatement of the position of the courts in refusing to allow such damages. This is brought out in the following colloquy (see 83 Congressional Record 7156) between Congressman Thomas A. Jenkins and Chairman William M. Whittington whose Committee on Flood Control, House of Representatives, reported House bill 10618, Seventy-fifth Congress, the derivative source of the language appearing at 33 U.S.C. 701 c-1.

> "MR. JENKINS of Ohio. *** I take this time to ask the chairman of the committee another question. I am much concerned with the proviso in the twelfth line on page 2:
>
> "'Provided, That no reimbursement shall be made for any indirect or speculative damages.'
>
> "I agree with the purpose of that, and I think I understand what it means, but it seems to me that will open the door for a lot of litigation or trouble, at least. Why insert that; why not leave that out, and let the Army engineers determine what the Government shall pay? By designating that, does not the gentleman invite a lot of trouble?
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> "MR. WHITTINGTON. On the contrary, *** I think the language which was suggested to us by the Chief of Engineers, will protect the Federal Treasury. I know the gentlemen is a lawyer by profession and an excellent one, because I have been in

his home district. The gentleman knows that even in a court of law one cannot recover speculative and indirect damages, and if they cannot be recovered in a court of law why should the Government pay for such damages?

"MR. JENKINS of Ohio. I think the language is mere surplusage and ought not to be here, but I am not going to oppose the legislation on that ground. I am merely raising the question of whether this is necessary.

"MR. WHITTINGTON. The reason the language was included is to protect the Federal Treasury."

Also, in Karlson v. United States, 82 F. 2d 330, 337 (8th Cir. 1936), the opinion is stated that the Government's obligation is to compensate only for what is taken, on the theory that to award an injured party more would be unjust to the public.

Engineer Regulation 1180-1-1 concerns the legal obligation of the Government for just compensation for the acquisition of municipally owned facilities, such as streets, sidewalks, water and sewer systems, and public buildings, and states:

"Just Compensation. The Fifth Amendment to the Constitution of the United States provides that just compensation will be paid for the taking of private property for public use. *** In publicly-owned roads and utility systems, as well as in privately-owned railroads and utility systems, the Federal Courts have held that the liability of the United States for such acquisition is the cost of providing substitute facilities where substitute facilities, are, in fact, necessary. Conversely, where it can be shown that there is no necessity for such substitute roads, railroads or utility systems, or portions thereof, the Federal Government is required to pay only nominal consideration. ***"

Examples of the Federal court decisions are found in United States v. Arkansas, 164 F. 2d 943, 944 (8th Cir. 1947), and California v. United States, 169 F. 2d 914, 924 (9th Cir. 1948).

The regulation states also:

"Legal Considerations. The leading case in connection with the relocation of a town is United States vs. New Woodville, Oklahoma, 152 F 2nd 735. *** The Circuit Court of Appeals for the 10th Circuit *** stated further:

"'It is well settled that the compensation to which a city is entitled when its streets are condemned is the cost of providing necessary substitutes therefore. But where a city is not required to provide substitutes and it is not necessary to do so, it has suffered no financial loss and is therefore not entitled to substantial damages for the taking of such public ways. ***'"

The regulation provides that where replacement of a facility is necessary, the substitute facility shall as near as practicable serve the owner in the same manner as and as reasonably well as the replaced facility. The regulation provides also that the cost of betterments are to be paid by the owners of the property. Betterments are defined by the regulation, as follows:

"Determination as to Adequacy of Substitute Facility and Reasonableness of Cost. If it has been determined that a relocation, alteration or protection is required, it will be planned to afford a degree of serviceability and susceptibility to flood or other damages comparable to that possessed by the existing facility. Anything provided over and above such construction at increased cost must be considered a betterment and the payment of cost thereof must be borne by the owner of the facility. The term 'betterments' should not, however, be interpreted to include more costly construction or construction to a higher class if such is necessitated solely as a result of the relocation." (Second underscoring supplied.)

When lands within municipal boundaries are acquired for dam and reservoir projects, the Government frequently discharges its legal obligation for damages to municipally owned facilities on such lands by compensating the municipality for the cost of relocating the facilities or by providing replacement facilities.

To be eligible for compensation by the Government, the municipality must meet certain basic requirements of the Corps. The municipality must select a new site, incorporate the site into the municipal boundaries, secure approval of the site by a sufficient number of the residents that must relocate, and enact an appropriate resolution signifying the intent of the municipality to relocate to the new site. Fulfillment of these requirements enables the Corps to commence planning for the relocation of the facilities and the adjustment of the residual facilities to meet project conditions.

Before entering into a relocation agreement, the Corps requires the municipality to take a poll of the private property owners in the area to be taken to determine the number of lots that the eligible relocatees will require at the new site. The municipality also must submit a plan for the relocation. After receiving the relocation plan and the results of the poll, the district office prepares a design memorandum to serve as a basis for (1) various technical and administrative approvals in the division and Chief of Engineers offices and (2) negotiation of a relocation agreement with the municipality.

The municipality may agree to make the actual relocation of its facilities and to convey to the Government its easements or rights-of-way, and the Government, in consideration thereof, agrees to compensate the municipality for the cost of the relocation. The relocation work may also be accomplished by Government forces or by a party other than the municipality under contract with the Government.

The relocation plan of the municipality may include features or facilities, or parts thereof, which the Corps has determined are not the legal responsibility of the Government. The Corps' regulation provides that the cost of the municipal facilities in excess of the Government's legal obligation be borne by the owner of the facilities.

FINDINGS AND RECOMMENDATIONS

NEED TO IMPROVE PROCEDURES FOR COMPENSATING MUNICIPALITIES FOR RELOCATING FACILITIES

Our review has shown that there is a need for the Corps of Engineers to improve its procedures for determining the compensation to be paid municipalities for facilities acquired by the Government. We found that the Corps of Engineers had provided compensation for replacement facilities, which exceeded the Government's legal obligation for just compensation for the acquisition of facilities owned by six municipalities. The acquisition of the facilities, such as streets, sidewalks, and water and sewer systems, was necessitated by the construction of Federal water resources projects.

We found that, in compensating four of the six municipalities for the relocation of facilities, the Corps, in order to allow for such factors as future expansion and latitude in lot selections, had been following a practice of providing facilities to serve lots which were excess to those required for the relocations. This practice resulted in the Corps' providing an average of 34 percent more facilities than those which we believe were required to fulfill the Government's legal obligation to the four municipalities and increased the cost of these relocations by about $367,000.

For the two remaining municipalities, we believe that the Corps compensated the municipalities for the relocation of facilities for which there was no obligation on the Government for replacement. In both municipalities there were sufficient lots available in the existing community to accommodate all residents who had indicated an intent to relocate to a new site. The combined cost of relocating the municipal facilities for these towns was about $412,000.

We believe that significant savings can be achieved on future relocations of municipal facilities if Corps policies and procedures are revised to limit the replacement facilities to be provided to those required to as near as

practicable discharge the Government's legal obligation. We are not recommending, however, that the Corps attempt to recover the funds expended for the facilities discussed herein because the municipalities entered into the relocation agreements in good faith.

The results of our review are discussed in greater detail in succeeding sections of this report.

Facilities provided exceeded those needed for eligible relocatees

At four municipalities we found that the Corps had incurred additional costs of about $367,000 because the replacement facilities for which it paid compensation averaged 34 percent greater than those needed to serve residents who had indicated an intent to move to the new area. We found that, after determining how many lots the relocating residents would require at the new site, the Corps' district offices provided for additional lots and related municipal facilities to allow for such factors as future expansion and latitude in lot selections.

In our view, the payment of compensation for these additional facilities constitutes a violation of the first proviso of 33 U.S.C. 701 c-1 which states that no reimbursement shall be made for any indirect or speculative damages. Also, as discussed in the Engineer regulation (see pp. 4 and 5), court decisions in condemnation cases have stated that the Government's liability for the acquisition of municipal facilities is the cost of providing replacement facilities where they are, in fact, necessary.

The following table compares the number of lots that the polls of eligible relocatees indicated would be required in the new areas of the four municipalities with the number of lots served by the municipal facilities in the relocation areas.

Project	Municipality	Lots required per poll	Lots served by facilities financed by Corps	Lots provided in excess of requirement		Cost of facilities to serve excess lots (note a)
				Number	Percent	
Barkley	Eddyville:					
	Residential and public use	130	150	20	15	
	Commercial	29	40	11	38	
	Total	159	190	31	19	$ 66,000
Barkley	Kuttawa (note b)	119	153	34	29	93,000
John Day	Arlington (note b)	115	168	53	46	176,000[c]
John Day	Boardman (note b)	54	89	35	65	32,000
		447	600	153	34	$367,000

[a]District officials reviewed the cost estimates and stated that our methods of computation and the amounts appeared reasonable.

[b]Residential and public use.

[c]Cost of one residential section comprising 45 lots.

The table includes commercial lots for the Eddyville relocation because we found a significant variance in the number of lots served by municipal facilities in the relocation area compared with the number required on the basis of the poll. For the other municipalities, the number of lots provided for commercial purposes did not vary significantly from the number requested.

The compensation paid to the city of Boardman, Oregon, for municipal facilities to replace those acquired by the Corps is a typical example of the four municipal relocations and of the Corps' practices. The Corps compensated the city for the construction of replacement facilities to serve 89 residential lots even though 54 lots would have been sufficient to accommodate those residents who had expressed an intent to move to the city's relocation area. We estimate that the facilities to serve the 35 additional lots increased the cost to the Government by about $32,000.

The relocation of Boardman resulted from the construction of the John Day Lock and Dam project, which necessitated that the Corps acquire all land within the existing city limits. The Corps planned to provide for the reestablishment of all needed municipal facilities at a new site. In 1956 the residents of Boardman expressed their unanimous desire to relocate to a new site. According to information filed with the design memorandum, a poll of the residents in 1960 indicated that 51 residential lots would be required at the new site.

The district office added three lots for the relocation of churches and provided a 25-percent expansion allowance which increased the number of residential lots to 67. However, the relocation agreement with the city indicated that 76 residential lots were anticipated. A cognizant district official advised us that the nine additional lots were provided to give the residents some latitude in choice of location. The streets and utility systems were substantially completed by the city in October 1965. As actually constructed, the facilities would serve 89 residential lots, or 13 more than provided for in the relocation agreement and 35 more than needed to accommodate the residents and churches intending to relocate.

The 13 additional lots resulted because the size of the lots in the relocation area were reduced by the municipality before the facilities were constructed. Even though the lots in the relocation area were subdivided, they were still substantially larger than the lots in the area acquired by the Corps for construction of the dam.

The total cost of providing streets and utilities for the new residential area was about $427,000, including city engineering costs. We estimated that the construction of streets and utilities to serve the 35 additional residential lots had cost the Government about $27,000 of the total amount. Other costs of about $5,000 would be incurred for relocating telephone and electric facilities to serve the additional lots.

In June 1966, information provided by a city official indicated that 51 lots in the new area had been purchased--37 by former residents of the area acquired by the Corps and 14 by persons new to the town. Of the 37 lots purchased by the former residents, five were to be used for community purposes, such as for a church, city hall, and grange hall.

Our review of the Corps' documents relating to the relocations of the four municipalities revealed that the additional facilities were provided to allow for future expansion in all of the municipalities , as well as to allow for latitude in lot selections in two of the municipalities. However, we found no evidence to support the determination of the number of additional lots to be provided at a particular site or the determination that expansion would occur.

We were advised by division and district officials that one reason for the Corps' paying for the additional facilities at two municipalities had been to assist the cities in avoiding financial hardships which might have occurred if a tax increase or tax assessment became necessary to provide facilities for a possible future expansion. One official advised us also that the additional facilities had been provided to allow for inaccuracies in the poll of the residents of the area to be relocated. In one case the division engineer was advised by the Office of the Chief of Engineers that the final number of lots to be provided for could include "an extra allowance of from twenty to thirty percent of the number presently indicating a willingness to relocate." No reason for the extra allowance was given.

We were advised by the Chief of the Operations Division, Directorate of Civil Works, that he had been approving additional municipal facilities on a Corps-wide basis to allow for a contingency for those people who, subsequent to the poll, changed their minds and decided to relocate to the new site. He stated, however, that the Corps had not made a study of completed relocations to determine whether experience indicated an increase or decrease in the number of eligible relocatees moving to the relocation site subsequent to the poll and that the Corps had probably been remiss in not making such a study.

We pointed out that the inaccuracy of the poll had not been one of the reasons stated in the project documents and in official correspondence and that the provision for future expansion seemed to be the reason most often stated. He replied that the Corps had no written instructions concerning additional lots and that the district and division offices may not have understood why the facilities for the additional lots were being approved.

The speculative nature of providing a contingency factor for the inherent inaccuracies of the poll is illustrated by the relocation at Boardman. The poll of residents in the area to be acquired by the Corps had indicated a need for 51 residential lots. However, in June 1966 after construction of the facilities, only 37 lots had been purchased by these residents. A city official told us that residents still living in the area taken by the Corps either did not plan to relocate in the city or had already purchased lots in the new residential area but had not completed their relocation.

The Chief of the Planning and Purchase Branch, Directorate of Real Estate, stated that the Corps had a responsibility to provide municipal facilities in a relocation area with an expansion capability equivalent to the expansion capability consisting of existing facilities available to serve vacant lots in the area acquired by the Corps.

The speculative nature of providing facilities for future expansion is illustrated by the events which occurred at Umatilla, Oregon. The town had anticipated considerable growth after the nearby construction of the McNary Lock and Dam, which was placed in operation in 1953, and issued bonds to finance construction of municipal facilities to meet the expected growth. However, the population declined about 30 percent between 1950 and 1960 and the town experienced considerable financial difficulties because the bond debt was increased and the population to share the tax load was reduced. During the subsequent construction of the John Day Lock and Dam, the Corps of Engineers relocated a portion of these facilities and the Congress appropriated funds for a grant of $50,000 to provide a measure of financial relief to the city for its loss of tax base. (See pp. 19 through 23.)

The District Engineer at Walla Walla, Washington, indicated that replacements had been provided for the expansion capability existing in the municipal facilities taken at Umatilla, Arlington, and Boardman and that perhaps the facilities for this expansion capability should not have been constructed at Government expense. We found that the district ordinarily added an arbitrary percentage of replacement facilities for this expansion allowance and for other purposes, as described on page 10. However, no attempt was made by the district officials to determine whether the municipalities' original bases for constructing the expansion capabilities in the old facilities were reasonable or speculative.

In our opinion, a provision for expansion capability in the replacement facilities not in excess of the expansion capability of the acquired facilities would not be improper, provided that there was a reasonable basis for expecting a growth of the town apart from the growth resulting from the construction of the Federal water resources project. We believe, however, that the Corps' practice of compensating municipalities for facilities to serve an area in excess of demonstrated needs constitutes payment for indirect and speculative damages, which is prohibited by law, and inappropriately increases the cost to the Government of relocating municipal facilities.

Agency comments and our evaluation thereof

We proposed that the Chief of Engineers revise existing written instructions to the division and district engineers to require that, when replacement facilities are necessary for relocating residents, no payment be made for facilities beyond those necessary to serve only those eligible relocatees who have indicated their intent to move to the relocation area.

The Department of the Army, in a letter dated May 11, 1967 (see app. III), commenting on the matters presented in this report, stated, in part:

> "The report places great emphasis on the eligibility of relocatees for the new area. The

purpose of our regulations is to establish the need for the area, and its size, in order to determine what publicly-owned facilities are to be provided. Our regulations use the premise that a certain reasonable percentage of those residents who will be dislocated by the project are to be moved into the new town area. However, we do not relocate these people and the fact that this method is used to determine the size of the area does not dictate eligibility for residence in the area."

We have used the term "eligible relocatees" in reference to the residents of an area taken for a project since they would be the persons polled to determine the requirements for replacement facilities. The term is used to distinguish them from other persons who would not be eligible to participate in the poll, and its use is not meant to imply that only persons residing in the area taken by the Corps would be eligible for residence in the new area.

The Department of the Army stated that the existing regulations would be changed to be more specific as to the procedures to be followed in determining the need for relocation and the limit of Federal obligations. The Department stated also:

"The contemplated changes involve the application of a contingency or judgment factor not to exceed ten percent more facilities than the initial surveys show are required. This contingency limitation will not be published in the regulations, but will be applied by the Chief of Engineers staff in the review of the design memorandum, and should serve to reduce the scope of replacement facilities in initial planning stages."

As noted on page 11 of this report, the Chief of the Operations Division, Directorate of Civil Works, had approved the additional facilities as a contingency factor for those people who, subsequent to the poll, change their

minds and decide to relocate to the new site. The Chief of the Operations Division informed us that he thought he had been approving a contingency factor of about 30 percent. In the four cases that we reviewed, the contingency factor averaged 34 percent but ranged from 15 to 65 percent. The 30-percent factor was not mentioned in the Engineer Regulation. The new factor of 10 percent also is not to be recorded in the regulation.

The contemplated changes in the Corps' procedures are not completely responsive to our proposal because the changes provide for the use of a contingency allowance in determining the amount of municipal facilities to be provided at a relocation site. We believe that the use of a contingency factor in determining the replacement facilities to be provided at a relocation site is inappropriate, because in any poll there is an inherent judgment factor and the inclusion of a contingency serves only to compound the potential for error in the amount of municipal facilities that the Government should provide to meet the requirements of the law. We remain of the opinion that payment allowing for any contingency factor constitutes compensation for indirect or speculative damages, which is prohibited by law.

Recommendations to the Secretary of the Army

We therefore recommend that the Secretary of the Army direct the Chief of Engineers to issue instructions to require that, when replacement facilities are necessary to serve eligible residents, no payment be made for facilities beyond those necessary to serve only those individuals who have indicated their intent to move to the relocation area. In the interest of ensuring that this recommendation is properly implemented, we recommend that the Chief of Engineers revise existing instructions to specifically prohibit payments for additional facilities in the relocation area that would provide for:

1. Future expansion where the facilities taken do not have an existing expansion capability.

2. Future expansion due to the project, regardless of whether the capability exists in the facilities acquired.

3. Latitude in lot selection.

4. A contingency factor for inaccuracies of the poll.

Due to the speculative nature of constructing municipal facilities before the actual demand for their use, we believe that the replacement of facilities which are not in use in the area acquired for project purposes should be restricted. Only if there is a sound basis for expecting growth of the municipality, apart from the growth resulting from the construction of the Federal water resources project, can replacement of such facilities be justified and then only to the extent that they are existing in the area acquired.

Unnecessary substitute facilities provided

On the basis of our review, we believe that the municipal facilities provided to serve the relocation areas at Eufaula, Oklahoma, and Umatilla, Oregon, were not necessary. The Federal Government incurred costs of about $412,000 for the construction of these facilities.

The Corps' regulations concerning relocations state that, where the Corps takes public facilities and there is no need to provide replacements for such facilities, the Federal Government is required to pay only nominal consideration. (See p. 4.) For both Eufaula and Umatilla, we believe that there was sufficient evidence available to the Corps, before it entered into the relocation agreements, to warrant determinations that the replacement facilities were not necessary and that the Government was liable for only nominal consideration for the acquisition of the municipal facilities.

Eufaula, Oklahoma--The Corps paid the city of Eufaula about $198,000 for replacement facilities, although there was no clearly established need for these facilities at the time the Corps entered into the relocation agreement. In our opinion these facilities were not needed because (1) during a delay of about 15 months between the time the residents were polled and the date the relocation agreement was signed, many of the residents in the area taken by the Corps had already resettled in other locations and (2) there were sufficient vacant lots and houses in the areas of Eufaula not taken by the Corps to accommodate all remaining affected residents.

In November 1959, the city designated a relocation area for resettling residents of Eufaula who would be displaced by the construction of the Eufaula Reservoir. In January 1960, the city submitted a poll to the Corps, which indicated that 56 property owners were interested in relocating in the resettlement area. In June 1960, the city selected a new site for the resettlement area because it could not acquire the site originally selected. In April 1961, the Corps and the city entered into a fixed-price relocation contract which provided that the Corps would pay the city

about $198,000 for the construction of municipal facilities in the designated resettlement area.

The poll submitted by the city was more than 15 months old when the Corps and the city entered into the relocation contract. Nevertheless, the Corps did not request that the city submit a more current poll. Although the poll showed that 56 persons had been interested in moving to the previously designated site, at least 19 of these individuals had relocated to other sites by the time the Corps entered into the contract to pay for relocating the municipal facilities. These 19 persons had filed claims for reimbursement of resettlement expenses, and the Corps had approved the claims. Thus the Corps should have been aware that at least some of the municipal facilities were not needed.

Our review of the Corps' resettlement records for 106 of a total of 126 eligible relocatees (records for the 20 remaining relocatees were not available) indicated that 87 residents of the area acquired by the Corps had moved to existing areas of the city or elsewhere before the relocation agreement was signed. All 126 residents were relocated before February 1964 when the dam was closed to begin impounding water; of these residents, only four had moved to the relocation area provided by the Corps. Had the Corps taken another poll before entering into the relocation agreement with Eufaula, we believe that the results of that poll would have indicated that the relocation area was unnecessary.

In August 1966, we looked at the vacant lots available in the areas of Eufaula that were not taken for the reservoir project. We selected more than 40 lots which were suitable for residences and were available at the time the Corps entered into the relocation agreement with Eufaula. Also, a city official told us that there had been 15 to 20 vacant houses available in the areas of Eufaula not taken by the Corps and that the population of Eufaula was then about the same as it was in the 1960 census. We believe that it is reasonable to assume that these vacant lots and houses would have been sufficient to accommodate all eligible relocatees remaining in the area acquired by the Corps at the time the relocation agreement was signed and that the Corps could

have made this determination before entering into the agreement.

City officials informed us that they had anticipated that construction of the reservoir would result in an increase in Eufaula's population. An official stated, however, that more than 300 registered voters had moved from the city and that the city had lost employment potential when four cotton gins discontinued operations because the reservoir had taken in the bottomland on which the cotton was produced. He stated also that more people would have moved to the relocation area except for the city's delay in selecting the site.

Tulsa district officials stated that, when there was an indication of a need for a relocation area for a city, it was the Corps' policy to participate in constructing such an area. The officials maintained that the poll furnished by the city was evidence that the relocation area was needed and indicated that, if they were subsequently faced with the same problem, they would provide municipal facilities for a relocation area.

We agree that, when a municipality desires to relocate facilities in conjunction with the construction of a Federal water resources project and when a poll of the residents of the area indicates that a substantial number intend to relocate in the new area, the Government should compensate the municipality for relocating the facilities. However, we do not agree that the existence of a poll constitutes a legal obligation to provide replacement facilities. We believe that, when the poll is outdated and other factors indicate that the need for replacement facilities no longer exists, the Government's legal liability is limited to the payment of nominal consideration for the facilities taken.

Umatilla, Oregon--The Corps compensated the town of Umatilla for facilities to serve a new residential area even though available lots in the areas of the city not taken by the Corps would have been sufficient to accommodate all residents of the area acquired for the construction of the John Day Lock and Dam project. We believe that, if the Corps had

given adequate consideration to the evidence available, it could have avoided costs of about $214,000 for facilities to serve the relocation area.

According to the district's design memorandum, the city's poll of the residents indicated that 33 families and 2 churches in the area to be taken by the Corps intended to relocate within Umatilla's revised city limits. On the basis of these statistics, the district determined that the Government's responsibility would be met by compensating the city for the cost of new streets and utility systems to serve 53 residential lots, or 20 more than needed to accommodate the residents who had expressed an intent to relocate.

A question as to the need for a new residential area was raised when the city requested a lump-sum payment for the estimated cost of the replacement facilities, rather than funds for the construction of the replacement facilities in a residential area. A letter dated August 12, 1964, to the Chief of Engineers from attorneys for the city stated that:

> "Some years ago, the City, anticipating a natural growth due to the McNary Project, floated a rather substantial bond issue in order to finance the construction of new sewers and water lines. This bond issue, coupled with other incremental real property taxes, has given the City of Umatilla one of the highest millage rates of any city in the State of Oregon. The balance outstanding on the bond issue at this date is approximately $140,000.00, and with the proposed acquisition imposing such a disproportionate tax burden upon the remaining two-thirds of properties within the City limits, has made it almost economically impossible for the city to survive. ***"
>
> * * * * *
>
> "At a recent conference with representatives of the Walla Walla District, we proposed in lieu of the Corps immediately providing funds to the City

for constructing a new residential area, that a lump sum settlement in the same estimated amount be made instead. ***"

* * * * *

"Our reason for suggesting a lump sum settlement instead of agreeing to the immediate institution of work on the Peterson Addition is *** the City of Umatilla will nonetheless be left in this predicament:

"(1) The outstanding bond issue in the sum of $140,000.00 will still have to be paid;

"(2) Because of the loss of major industries, the resulting tax burden on the remaining residents will be disproportionately greater, reaching in many instances, confiscatory rates;

"(3) This disproportionately greater tax burden will discourage resettlement in the Peterson Addition and possibly result in fewer residents electing to resettle in the Peterson Addition.

"If *** the Corps simply makes a lump sum settlement with the City *** such a settlement would *** permit the City to accomplish the following:"

* * * * *

"(b) Construct new streets, sewers and water lines on an incremental basis <u>as needed and required</u>; ***."
(Underscoring supplied.)

In forwarding the attorneys' letter to the Chief of Engineers, the District Engineer stated that:

"*** any lump sum settlement which would permit 'diversion' of funds would be a contradiction of

the basic justification for re-establishing the facilities, namely 'continuing need.'"

* * * * *

"*** it is the opinion of this office that the request for lump-sum settlement should be disapproved because of the very likely occurrence of the risks, dangers, and adverse public relations problems such diversion of funds would likely generate ***."

The Chief of Engineers disapproved the city's request for a lump-sum payment and the district entered into a cost-reimbursable contract with the city, dated October 16, 1964, for relocation or alteration of streets and utility systems affected by the project.

We believe that the city's request for a lump-sum payment instead of funds for immediate construction of facilities to serve a new residential area indicated that replacement facilities were not needed and should have alerted the Corps to the need for reevaluation of the decision to provide funds for such facilities.

The contract with the city provided that the Government would reimburse the city for the actual cost of relocating or modifying streets and utilities, including replacement facilities to serve 46 residential lots and a church site. The area was actually subdivided into 45 residential lots and the church site. Streets and utility systems were estimated to cost about $200,000, including city engineering costs, and telephone and electrical distribution systems were to cost about $14,000.

In addition to the compensation provided by the Corps for municipal facilities, a grant of $50,000 to afford a measure of financial relief to the city was provided by Public Law 89-781, approved November 6, 1966.

During a tour of the city, we noted that there were many vacant lots within the areas of the city not taken for project purposes. Information provided by a city official indicated that, in May 1963 before execution of the relocation contract, there were 129 vacant lots in existing

residential areas not to be taken by the Corps, which should have been sufficient to accommodate all displaced residents, not just the 33 who had expressed their intent in a poll to relocate in the city or the 45 that could have been accommodated in the new residential area. In fact, many of the residents subsequently relocated in those existing residential areas.

During our review, we were informed by a city official that 19 residents were still living in the area taken by the Corps for project purposes and that 48 former residents had relocated in or near Umatilla. Only three of the 48 residents moved to the Corps relocation area and these three had not indicated an intent to do so during the poll. At the time of our review, 42 of the 45 residential lots in the relocation area had not been sold.

Regarding the anticipated growth of Umatilla because of the McNary Lock and Dam Project (see p. 20), the design memorandum shows that this growth was not realized and that the population actually declined after that project was completed. The population census for 1950 showed 880 residents and for 1960 showed 617 residents, a decline of 263 or about 30 percent. The McNary Lock and Dam project was placed in operation in 1953.

If the facilities paid for by the Corps had been limited to those necessary after the use of available lots in undisturbed areas of the city had been allowed for, the municipal facilities at the relocation area could have been omitted and the costs of about $214,000 could have been avoided.

We believe that the Corps should evaluate any evidence that the replacement facilities may not be needed so that all evidence concerning the Government's legal liability arising from the acquisition of municipal facilities may be considered before a determination of liability is made and so that the expense of unnecessary relocations may be avoided. As illustrated by our review, evidence concerning vacant lots and houses in undisturbed areas of a town which may be available to accommodate displaced residents is of primary importance in such an evaluation.

Agency comments and our evaluation thereof

We found that the evidence considered by district offices in determining the Government's legal obligation to provide replacement facilities had been limited to that which supported the need for relocation. We therefore proposed to the Department of the Army that the Chief of Engineers require district offices to consider and evaluate evidence that replacement facilities may not be needed and to include the evaluation of this evidence in a written determination of the Government's legal liability arising from the acquisition of the municipal facilities. The Department did not comment on this proposal.

We proposed also that the Chief of Engineers issue written instructions to the division and district engineers requiring that, when, in connection with the acquisition of municipal facilities, a substantial time has elapsed since a poll has been taken of eligible relocatees to determine their intent to move to the relocation site, a second poll be taken and a reevaluation made as to the need for the replacement facilities before entering into a relocation agreement with the municipality. The Chief of Engineers issued instructions on May 1, 1967, substantially in accordance with this proposal.

The Department of the Army, in commenting on a draft of this report in its letter of May 11, 1967, stated that:

> "The Chief of Engineers does not consider that the letter from the City of Umatilla requesting a lump-sum payment served to alert the Corps to a need for re-evaluation. The city was hard-pressed financially due to loss of tax-base in the relocation and sincerely sought a means to retire its bonded indebtedness in lieu of performing required facilities construction. In other words, the inhabitants in the new section would have suffered detriment by lack of street and utility development until the city was financially able to proceed. The Corps of Engineers did not assent to this plan with the result that the city eventually secured $50,000 in special legislation."

In our opinion, there were two distinct but interrelated problems involved in this relocation: (1) whether a relocation was necessary and (2) the impact of the city's loss of tax base on its already hard-pressed financial situation.

With regard to the first problem, the Department of the Army made reference to "required facilities construction" and indicated that it was still of the opinion that the relocation was necessary. However, no additional evidence or reasoning was presented.

With regard to the second problem, we question whether the loss of a tax base due to the taking of a portion of the city's facilities was the principal cause of the city's poor financial condition. The city was already hard pressed financially, as stated by the attorneys for the city, because of previous unrelated events. This condition was aggravated by the loss of tax base.

Inasmuch as there did not seem to be any means within the Chief of Engineers' scope of authority for alleviating such a situation, we believe that it would have been proper for the Corps to have paid the city only for the nominal value of the facilities taken.

The Department of the Army stated also that the inhabitants in the new section would have suffered detriment by lack of street and utility development until the city had been able to proceed. We do not agree because, if the Corps had not entered into the cost-reimbursable contract for facilities for the relocation area and had taken the alternative discussed in the preceeding paragraph, the relocation area probably would not have been developed and the three residents and the church could have been located in the existing areas of the city served by municipal facilities.

Conclusions

The Federal courts have held that, where there is no necessity for the replacement of municipal facilities, the Federal Government is required to pay only nominal consideration. We believe that there was sufficient information available to the Corps, at the time it entered into the

relocation agreements with Eufaula and Umatilla, to show that there was no need for the replacement facilities and that the two cities were entitled only to payment for the nominal value of the facilities taken.

Recommendation to the Secretary of the Army

We recommend that the Secretary of the Army direct the Chief of Engineers to emphasize to all responsible Corps officials the need to critically evaluate evidence indicating that a contemplated relocation of municipal facilities is not necessary and to include the evaluation of this evidence in the design memorandum prepared for the planning of the project and in subsequent reevaluations. In its evaluation, the Corps should consider information relating to (1) the availability of lots in the areas of the municipality not taken by the Corps and (2) the alternatives to providing replacement facilities.

APPENDIXES

PRINCIPAL MANAGEMENT OFFICIALS OF THE DEPARTMENT OF DEFENSE AND THE DEPARTMENT OF THE ARMY RESPONSIBLE FOR ADMINISTRATION OF THE ACTIVITIES DISCUSSED IN THIS REPORT

	Tenure of office	
	From	To
DEPARTMENT OF DEFENSE		
SECRETARY OF DEFENSE:		
Robert S. McNamara	Jan. 1961	Present
Thomas S. Gates, Jr.	Dec. 1959	Jan. 1961
Neil McElroy	Oct. 1957	Dec. 1959
Charles E. Wilson	Jan. 1953	Oct. 1957
DEPARTMENT OF THE ARMY		
SECRETARY OF THE ARMY:		
Stanley R. Resor	July 1965	Present
Stephen Ailes	Jan. 1964	July 1965
Cyrus R. Vance	July 1962	Jan. 1964
Elvis J. Stahr, Jr.	Jan. 1961	June 1962
Wilbur M. Brucker	July 1955	Jan. 1961
CHIEF OF ENGINEERS:		
Lt. Gen. William F. Cassidy	June 1965	Present
Lt. Gen. Walter K. Wilson, Jr.	May 1961	June 1965
Lt. Gen. Emersen C. Itschner	Oct. 1956	May 1961
Lt. Gen. Samuel D. Sturgis	Jan. 1953	Sept. 1956
DIRECTOR OF CIVIL WORKS (note a):		
Brig. Gen. Harry G. Woodbury	Feb. 1967	Present
Brig. Gen. Walter P. Leber	July 1966	Feb. 1967
Maj. Gen. Jackson Graham	Mar. 1963	July 1966
Maj. Gen. Robert G. MacDonnel	Apr. 1962	Feb. 1963
Maj. Gen. William F. Cassidy	Sept. 1959	Mar. 1962

PRINCIPAL MANAGEMENT OFFICIALS OF

THE DEPARTMENT OF DEFENSE

AND THE DEPARTMENT OF THE ARMY

RESPONSIBLE FOR ADMINISTRATION OF THE ACTIVITIES

DISCUSSED IN THIS REPORT (continued)

	Tenure of office	
	From	To
DEPARTMENT OF THE ARMY (continued)		
DIRECTOR OF CIVIL WORKS (note a) (continued):		
Col. Stanley G. Reiff (acting)	July 1959	Aug. 1959
Brig. Gen. John L. Person	Aug. 1956	June 1959
Maj. Gen. Emersen C. Itschner	Mar. 1954	Aug. 1956

[a]Designated as Assistant Chief of Engineers, Civil Works, prior to 1960.

SUMMARY INFORMATION CONCERNING THE RELOCATIONS REVIEWED

Project Construction

Project	Authorization	Initiated	Substantially completed
Barkley Dam	River and Harbor Act of 1954 (68 Stat. 1248)	1957	1966
Eufaula Reservoir	River and Harbor Act of 1946 (60 Stat. 635)	1956	1965
John Day Lock and Dam	Flood Control Act of 1950 (64 Stat. 170)	1959	1968 (est.)

[a]Estimated date of Corps completion of payments for relocation work on municipal facilities.

[b]In addition, Public Law 89-781, approved November 6, 1966 (80 Stat. 1366), authorized a grant of $50,000 to the municipality to relieve financial difficulties connected with the relocation.

Municipality	Government cost (millions)	Relocation completion date (note a)
Eddyville, Kentucky	$1.0	Jan. 1966
Kuttawa, "	.9	June 1965
Eufaula, Oklahoma	.8	Jan. 1962
Arlington, Oregon	3.7	Dec. 1967
Boardman, "	1.9	May "
Umatilla, "	.5[b]	Dec. "
	$8.8	

DEPARTMENT OF THE ARMY
WASHINGTON, D.C. 20310

11 MAY 1967

Mr. J. T. Hall, Jr.
Associate Director
United States General Accounting Office
Washington, D. C. 20548

Dear Mr. Hall:

This is in reference to your draft report to the Congress, entitled "Review of the Determination of Compensation to be Provided for Municipal Facilities Affected by Federal Water Resources Projects, Corps of Engineers (Civil Functions), Department of the Army," dated March 10, 1967 (OSD Case #2573).

This report has been reviewed and attached is a statement of the comments of the Department of the Army. Inasmuch, as indicated therein, the Chief of Engineers has initiated action in response to your proposed recommendations to him, you may wish to consider revising them in finalizing your report.

I am informed that you have submitted a preliminary report to the Congress on this subject. The House Appropriations Subcommittee on Public Works Appropriations has requested the Chief of Engineers to comment on your preliminary report. I am authorizing the Chief of Engineers to furnish a copy of the inclosed statement to the Subcommittee in reply to that request.

I appreciate your courtesy in providing the opportunity to comment on your draft report.

Sincerely yours,

Alfred B. Fitt
Special Assistant (Civil Functions)

Incl
a/s

Comments of the Department of the Army on
Proposed Report of the General Accounting Office to the Congress Entitled:

"REVIEW OF THE DETERMINATION OF COMPENSATION
TO BE
PROVIDED FOR MUNICIPAL FACILITIES AFFECTED BY
FEDERAL WATER RESOURCES PROJECTS,
CORPS OF ENGINEERS (CIVIL FUNCTIONS),
DEPARTMENT OF THE ARMY,"
dated March 10, 1967

This draft report (hereinafter referred to as the report) recommends that the Chief of Engineers amplify existing regulations to (1) require substitute facilities be provided only to the extent necessary to serve eligible relocatees, (2) require that a current poll be taken when substantial time elapses between the dates of the original poll and construction, and (3) require the field offices to examine the need for the substitute facilities and document the Government's legal liability.

The many indeterminables in town relocations necessitated by construction of a water resources project make an exact determination of Federal responsibility difficult. In town relocations, as in no other relocation, the factors of political and social relationships come into play to such an extent that great skill and judgement must be exercised by the District Engineer in dealing with local groups or factions. The relocation of a town or a portion thereof is entirely a matter of choice with the town represented by its residents and officials. The town must formulate its own plans to relocate to a new site. The responsibility for the selection and acquisition of a new town site rests with the town. The Government will acquire within the town all the privately-owned real estate inside the project boundary.

After the town has determined that it will relocate, it is necessary to establish the obligation of the Government as to the provision of streets, sidewalks, water and sewer and other public facilities possessed by the town prior to the water resources project construction. The guidance provided in ER 1180-1-1 is directed toward establishing the limit of Federal obligation. There are some other limiting factors which are considered in design memorandum review relating to the extent of publicly-owned facilities actually existing in that part of the town taken by the project. For instance, if there is only 100 feet of sidewalk in that area, we would not expect to provide more than 100 feet of sidewalk in the new area. On the other hand, if the area is served by water and sewer we would expect to provide water and sewer service in the new area.

The report places great emphasis on the eligibility of relocatees for the new area. The purpose of our regulations is to establish the need for the area, and its size, in order to determine what publicly-owned facilities are to be provided. Our regulations use the premise that a certain reasonable percentage of those residents who will be dislocated by the project are to be moved into the new town area. However, we do not relocate these people and the fact that this method is used to determine the size of the area does not dictate eligibility for residence in the area. The fact that a resident stated his intention to move to the area and then later decided to move elsewhere does not invalidate the need for the relocation area. This same resident could very well have decided to move out of the area for personal reasons even if the project had not been constructed and some other person residing outside the area could decide to move in. The purpose is strictly one of providing public facilities, such as streets, sewer, water, street lighting, and other physical items owned by the town.

Certain relevant points are contained in the report relating to (1) the percentage of expansion space contained within the area taken, and (2) the timing of building the relocation area. With regard to the first point, the existing regulations will be changed to be more specific as to procedures to be followed in determining the need for relocation and the limit of Federal obligation.

The contemplated changes involve the application of a contingency or judgment factor not to exceed ten percent more facilities than the initial surveys show are required. This contingency limitation will not be published in the regulations, but will be applied by the Chief of Engineers staff in the review of the design memorandum, and should serve to reduce the scope of replacement facilities in initial planning stages.

In addition, Engineer regulations will be augmented to require continuing surveillance by the District Engineer as to the intentions of petitioners; i.e., property owners and tenants, to assure that there will be a sufficient number of units to be relocated and a sufficient number of people actually desiring relocation at the time of preparation of the feature design memorandum. Furthermore, it will be required (1) that surveillance will continue subsequent to approval of the design memorandum throughout the execution of the relocation contract and the procurement of construction pursuant thereto, and (2) that any change in the number of property owners and tenants beyond a reasonable contingency as approved in the

design memorandum will be considered for adjustment in the scope of the substitute facilities to be constructed at the expense of the Government.

With regard to the second point, an effort will be directed toward expediting the relocation of towns in relation to other relocation work, inasmuch as the reported cases involved protracted delays between planning and construction.

The Chief of Engineers does not consider that the letter from the City of Umatilla requesting a lump-sum payment served to alert the Corps to a need for re-evaluation. The city was hard-pressed financially due to loss of tax-base in the relocation and sincerely sought a means to retire its bonded indebtedness in lieu of performing required facilities construction. In other words, the inhabitants in the new section would have suffered detriment by lack of street and utility development until the city was financially able to proceed. The Corps of Engineers did not assent to this plan with the result that the city eventually secured $50,000 in special legislation.