



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON, DC 20310-0108

SACW

23-Sep-2021

MEMORANDUM FOR COMMANDING GENERAL, U.S. ARMY CORPS OF
ENGINEERS

SUBJECT: Implementation Guidance for Section 328 of the Water Resources
Development Act of 2020, Extinguishment of Flowage Easements, Rough River Lake,
Kentucky

1. Section 328 of the Water Resources Development Act (WRDA) of 2020 directs the Secretary, subject to the availability of appropriations and on request of the landowner, to extinguish any flowage easement or portion of a flowage easement held by the United States on developed land of the landowner at Rough River Lake, Kentucky that (1) is above 534' mean sea level (m.s.l.) and (2) for which the Secretary determines the flowage easement is not required to address backwater effects. Section 328 provides that the United States shall not be liable for any damages to property or injuries to persons from flooding that may be attributable to the operation and maintenance of Rough River Dam, Kentucky, on land that was encumbered by a flowage easement that was extinguished pursuant to Section 328. Section 328 of WRDA 2020 is enclosed.

2. This Section is applicable to Headquarters, Great Lakes and Ohio River Division and the Louisville District of the U.S. Army Corps of Engineers (Corps).

3. References:

a. Section 1175 of WRDA 2018.

b. SACW memorandum (Additional Guidance for Rough River Lake Flowage Easement Encroachment Resolution), 20 June 2019.

c. Rough River Lake Flowage Easement Encroachment Resolution Plan, dated January 2017.

4. Section 328 directly conflicts with the direction provided in reference 3.b. to maintain all flowage easements on properties above 534' m.s.l. and to only release the human habitation restriction on these properties. Accordingly, this guidance replaces the guidance provided in reference 3.b.

5. Implementation. In accordance with Section 328, in coordination with the Office of the ASA (CW) staff, the Corps updated the deed templates to provide for the release of flowage easements above 534' m.s.l. that are not required to address backwater

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effects. The templates include a clause releasing the Government of any and all liability associated with the flooding of the property. While Section 328 only directs the Secretary to extinguish flowage easements on developed land (i.e. land with a habitable structure), the Corps has also created a deed template with an indemnification and hold harmless clause that allows the Corps to release flowage easements, at a landowner's request, on undeveloped lands above 534' m.s.l. where the flowage easement is not required to address backwater effects. Such releases shall be made under the authority in 40 U.S.C. § 543, and the implementing regulations at 41 C.F.R. § 102-75.936 et seq.

6. Any flowage easement releases above the 534' m.s.l. line shall not affect the Government's flowage easement interest below the 534' m.s.l. line. The Corps will continue to follow existing guidance in reference 3.c. to provide releases of the human habitation restriction below 534' m.s.l., as appropriate.

7. In accordance with Section 1175 of WRDA 2018, the Corps shall not charge or collect any administrative fees from any property owners to provide releases of flowage easements and releases of the human habitation restriction.

8. Landowners who have already received a release of the human habitation restriction must re-submit requests for releases of flowage easements above 534' m.s.l. for the Corps to take action. After receiving a request, the Corps will make the release using the Partial Release of Flowage Easement deed template.

9. The District shall consult with landowners who have submitted requests and whose deeds have not yet been executed about the impacts of Section 328 and share the revised templates with them.

10. The Corps Director of Real Estate may develop and approve variations to the approved templates and delegate to the Great Lakes and Ohio River Division Real Estate Contracting Officer authority to approve deeds that follow the approved templates with no substantive deviations.

11. Under no circumstances shall this policy be modified, supplemented, amended, or rescinded, directly or indirectly, nor shall the Corps take action not in accordance with the direction herein, without the express written approval from the ASA (CW). This guidance shall be transmitted to the appropriate Corps Division and District Commanders and posted to the Corps' WRDA website within five business days of receipt (written or electronic) from this office. Guidance shall be transmitted and posted as is and without additional guidance attached.

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12. Questions regarding this guidance should be directed to Sharron Dacosta-Chisley, Office of the Assistant Secretary of the Army for Civil Works at sharron.h.dacosta-chisley.civ@army.mil or 703-695-6789.



Encl

JAIME A. PINKHAM
Acting Assistant Secretary of the Army
(Civil Works)

CF:
DCG-CEO
DCW

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Section 328. Extinguishment of Flowage Easements, Rough River Lake, Kentucky

(a) IN GENERAL. Subject to the availability of appropriations and on request of the landowner, the Secretary shall extinguish any flowage easement or portion of a flowage easement held by the United States on developed land of the landowner at Rough River Lake, Kentucky

(1) that is above 534 feet mean sea level; and

(2) for which the Secretary determines the flowage easement or portion of the flowage easement is not required to address backwater effects.

(b) NO LIABILITY. The United States shall not be liable for any damages to property or injuries to persons from flooding that may be attributable to the operation and maintenance of Rough River Dam, Kentucky, on land that was encumbered by a flowage easement extinguished under subsection (a).

(c) AUTHORIZATION OF APPROPRIATIONS. There is authorized to be appropriated to carry out this section \$10,000,000, to remain available until expended.