

U.S. DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE

LAND AND WATER CONSERVATION FUND
STATE ASSISTANCE PROGRAM

To: State Liaison Officers
Subject: Chapter 8 – F. Underground Utility Easements and Rights-of-Way PROCESS UPDATE
Date: January 3, 2017

Problem

Recently, the number and type of underground utility and other infrastructure projects proposed to cross under Land and Water Conservation Fund (LWCF) recreation areas has increased. The NPS, states, and local sponsors are receiving requests to allow pipelines, combined sewer overflow tanks, electrical transmission lines, and even light rail through real property (land) set aside for public outdoor recreation use in perpetuity under 54 U.S.C. Section 200305(f) (formerly referred to as Section 6(f)(3) of the LWCF Act; now referenced as LWCF recreation area). These widely varying underground projects often are not intended to serve the park or local needs, and the NPS believes some of these proposals go beyond the original intent of the Underground Utility Easements and Rights-of-Way policy and guidance provided in Chapter 8.F. of the 2008 LWCF State Assistance Program Manual (Manual).

Background

Although the Underground Utility Easements and Rights-of-Way policy was not formally incorporated into the Manual until 1989, its origins date to 1974. Initially the policy was quite limited – underground utilities were allowed only if they could be done without the landowner relinquishing any legal right to the area (e.g., an easement for access was not okay but a revocable permit was allowable). Although not explicitly stated, the original policy was intended to apply only to utilities serving the park or local needs, such as water for agricultural irrigation, or distribution of gas or electricity to the park or local homes and businesses in communities adjacent to the park. In addition, the impacts to existing public outdoor recreation were not significant.

Currently, many of the proposed underground “utility” projects involve installation of what is actually transportation infrastructure, both in their purpose and regulation, to facilitate efficient movement of goods and services. Often the alignments for these underground utility projects extend for miles beyond the LWCF recreation area, cross multiple jurisdictions including state lines, require owners to surrender or give up a property right through an executed legal instrument (easement), and maintain standardized rights of way widths of 50 to 200 feet instead of the 20 to 30 feet more typical of local utility lines. The policy provided in Chapter 8 – F. did not contemplate these types of uses or impacts.

F. Underground Utility Easements and Rights-of-Way – Process Update

Therefore, the NPS is temporarily invoking the right to review underground utility and other infrastructure projects proposed for approval under the self-executing authority provided in Chapter 8.F of the LWCF Manual. The NPS needs to review both the LWCF Manual policy and the underground project proposals to ensure the legal requirements of the LWCF Act are being met in the context of our rapidly changing landscape.

Exercising this right of review will allow the NPS to gather necessary data for comparison nationally to understand how the policy is being used and determine the circumstances under which these projects should actually be triggering a conversion. If necessary, the NPS will develop and officially release a revised policy

and/or guidance for underground utilities and infrastructure, but first the NPS needs to evaluate the nature and impacts of these alignments across LWCF recreation areas.

New Process

Effective immediately, States are to consult with their NPS Program Officer for all proposals involving the installation of any type of underground infrastructure (from fiber optic lines to pipelines) under LWCF property throughout the State/Territory, where an entity is either:

- a) exercising rights under a pre-existing easement or right-of-way to install new or expand capacity; or
- b) requesting a new easement or right-of-way where there is no pre-existing alignment .

The NPS will evaluate these proposals until we have a better handle on all the different types of requests and develop new or revised policy addressing the overall issue, if necessary. On a case by case basis, following the initial consultation with the NPS Program Officer we may request more information or data to assist you in making a determination about whether the situation will actually trigger a conversion, based on the specific circumstances. This information or data will also be incorporated into our national review of the policy and guidance provided in Chapter 8.F.

To facilitate the review of underground infrastructure proposals, states should submit the following details:

1. A description of the underground project proposal, including:
 - a. The purpose of the underground project
 - b. Construction – Whether this is a new underground project/corridor through the LWCF recreation area or an expansion within a pre-existing corridor (easement or right-of-way). The details for the LWCF recreation area such as:
 - i. the extent of disturbance - width, depth, and length of the alignment;
 - ii. the dimensions of the staging area during installation (if needed); and
 - iii. the duration of the surface disturbance (if any).
 - c. Restoration plan – The plans to restore the LWCF recreation area to its pre-existing outdoor recreation condition, and whether there would be any permanent changes to and/or restrictions on revegetation above the alignment.
 - d. Operation, maintenance, and obsolescence plan including routine maintenance (frequency and duration) and access required for emergency situations.
2. Current condition and recreational uses of the LWCF recreation area above the proposed alignment that would be impacted, including any recreational infrastructure.
3. Future restrictions on uses, development, and other impacts of this underground project on the surface and the public's outdoor recreation experience at the site.
4. A map of the proposed underground project area that shows it in context of the LWCF recreation area.
5. The current or planned holder of the easement or right-of-way, who will own the underground utility or infrastructure, and who would regulate this type of underground project.
6. A description of the rights that need to be conveyed (if any) and a copy of the proposed legal instrument (e.g., easement, lease, license) that would memorialize the agreement.
7. Details of how and why the underground project will not impact the recreational use of the park.
8. Copies of any environmental and/or cultural resources investigations and decisions made to date.
9. A transmittal letter from the SLO/ASLO with an opinion as to whether the state supports the proposal and a determination about whether it is allowable under the existing policy or if it would trigger a conversion.