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B-177092

RELEASED

74-0601

The Honorable Henry S. Reuss
Chairman, Subcommittee on Conservation
and Natural Resources
Committee on Government Operations
House of Representatives

HOISEA

R Dear Mr. Chairman:

This is our response to your September 19, 1973, letter, as modified by subsequent discussions with your office, concerning several matters in our report (B-177092, Sept. 12, 1973) entitled "Railroad Relocation at the R.D. Bailey Project, Justice, West Virginia."

You requested that we determine:

1. Whether the Corps of Engineers published its railroad relocation regulations in the Federal Register and, if not, whether such regulations should be published under the provisions of the Administrative Procedure Act relating to rulemaking (5 U.S.C. 553) or information publication (5 U.S.C. 552(a)(1)(D) and (E)).
2. Whether increases in railroad relocation and project costs were largely due to a failure to seek sufficient funds to complete the relocation on time.

RAILROAD RELOCATION INSTRUCTIONS

The Corps' railroad relocation regulations, entitled "Engineer Contract Instructions," have not been published in the Federal Register. The Corps' regulations implement and supplement the Armed Services Procurement Regulations and the Army Procurement Procedure and establish for Corps employees uniform legal and administrative requirements and procedures to be followed in making, administering, and terminating contracts; resolving claims and appeals; and conducting litigation.

Section 553 of title 5 prescribes agency rulemaking procedures, including publishing notices of proposed rules in the Federal Register. However, subsection (b), section 553, specifically exempts from the requirement for publication of proposed rulemakings "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."

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Section 552, title 5, provides, in part:

"(a) Each agency shall make available to the public information as follows:

"(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public * * *."

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"(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

"(E) each amendment, revision, or repeal of the foregoing."

Section 552(a)(1) relates to materials required to be published "for the guidance of the public." Consistent with this approach, subparagraph (D) seems particularly descriptive of matters reflecting primarily the exercise of substantive regulatory authority, which directly affect individual rights and liabilities. The distinction is reinforced by paragraph (a)(2) of section 552, which requires agencies merely to make available for public inspection and copying:

"(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

"(C) administrative staff manuals and instructions to staff that affect a member of the public * * *."

Many Engineer Contract Instructions provisions would interest persons dealing with the Corps and would acquaint them with the general policies, standards, and requirements governing contract matters. However, many deal only with administrative matters, such as preparing and approving relocation design memoranda or recommending acquiring property by condemnation. Moreover, the regulations as a whole are designed essentially for Corps employees' use and guidance.

Because the regulations do not directly affect individual rights and liabilities and are designed primarily for Corps employees' guidance, we believe such regulations are not required to be published in the Federal Register under either 5 U.S.C. 553 or 5 U.S.C. 552(a)(1)(D) and (E).

INCREASES IN COSTS

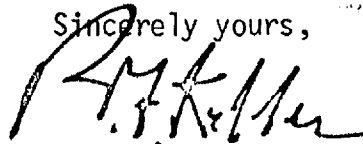
As noted in our report, the estimated total cost for the R.D. Bailey project had increased from \$76.6 million as of July 1966 to \$123.4 million as of January 1973, an increase of \$46.8 million. The portion of the estimate applicable to relocating the railroad right-of-way and adjacent highways increased from \$38.1 million as of July 1966 to \$49.2 million as of January 1973, an increase of \$11.1 million.

About \$32.5 million of the total increase, including that attributable to the railroad relocation, resulted from price-level changes in the construction industry since July 1966. As discussed in our report, funding constraints delayed project completion by about 3 years. Although we do not have information showing how much of the increase could be attributed to funding constraints in the President's budget, the 3-year delay in project completion, which resulted from these constraints, was a factor in the increased project cost. For example, the President's cutback on new construction contracts awarded by Federal agencies in fiscal year 1970 delayed contract awards for five segments of the railroad relocation. The Corps requested \$21.6 million for 1970, but this amount was reduced to \$10.7 million in the President's budget and the Congress appropriated the reduced amount. The delay in contract awards resulted in contract prices at levels which were higher than originally estimated.

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We shall not distribute this report further unless you agree or publicly announce its contents.

Sincerely yours,



Deputy Comptroller General
of the United States