

DEPARTMENT OF DEFENSE

**Corps of Engineers,
Department of the Army**

33 CFR Part 207

Navigation Regulations

AGENCY: Corps of Engineers,
Army Department, DOD

ACTION: Final rule.

SUMMARY: This rule revises reporting requirements for waterborne commerce statistics, including passengers, tonnage, freight, and other data, into a single section (33 CFR 207.800) of the Navigation Regulations for the Army Corps of Engineers. It also authorizes increased penalties for not reporting, or for reporting inaccurate information. These changes are necessitated by the Water Resources Development Act of 1986.

EFFECTIVE DATE: May 6, 1991.

ADDRESSES: Comments received and other materials relevant to this rulemaking are located at the Waterborne Commerce Statistics Center, room 171, Prytania Street and Leake Avenue, Post Office Box 61280, New Orleans, Louisiana 70161-1280. This record or rulemaking may be inspected at the Center between the hours of 7:30 a.m. and 4 p.m., Monday through Friday. Please call ahead to arrange for a review of these materials and to avoid any conflicts with inspections by other interested parties. A reasonable fee may be charged by the Center for copying services.

FOR FURTHER INFORMATION CONTACT: David L. Penick, Chief of Waterborne Commerce Statistics, at the above address, by telephone at (504) 862-1404 or send an E-mail to: David.Penick@MVN02.usace.army.mil.

SUPPLEMENTARY INFORMATION:

Legal Authority

The legal authority for the collection, compilation, and publication of waterborne commerce statistics by the Army Corps of Engineers is the River and Harbor Act of September 22, 1922 (42 Stat. 1043), as amended, and codified in 33 U.S.C. 555. This Congressional directive provides:

"Owners, agents, masters and clerks of vessels, and other craft plying upon the navigable waters of the United States, and all individuals and corporations engaged in transporting their own goods upon the navigable waters of the United States, shall furnish such statements relative to vessels, passengers, freight and tonnage as may be required by the Secretary of the Army: *Provided*, That this provision shall not apply to those rafting logs except upon a direct request upon the owner to furnish specific information.

Every person or persons offending against the provisions of this section shall, for each and every offense, be liable to a fine of not more than \$5,000, or imprisonment not exceeding two months, to be enforced in any district court in the United States within whose territorial jurisdiction such offense may have been committed. In addition, the Secretary may assess a civil penalty of up to \$2,500, per violation, against any person or entity that fails to provide timely, accurate statements required to be submitted pursuant to this section by the Secretary."

Information regarding vessel, tonnage, commodity, origin, and destination has been collected by the Corps of Engineers from vessel operating companies since 1922,

Background and Discussion

The waterways and ports of the United States handle approximately one billion tons of domestic cargo, five hundred million tons of imported cargo, and four hundred million tons of exported cargo annually. The effective and efficient movement of this cargo is critical to the economy of the local region and the United States as a whole.

It is a primary mission of the Army Corps of Engineers, where economically justified, to assure that navigation projects are properly maintained and ready to facilitate commodity and vessel movements by new project construction or improvements to existing projects. Thus, accurate and reliable data in the form of waterborne commerce statistics are essential to our mission. These statistics provide the requisite information for accurate cost-benefit analyses to determine new project feasibility and to establish funding priorities for the operation and maintenance of existing projects.

Information Collected

The Army Corps of Engineers maintains two types of data bases regarding commodity and vessel movements on the waterways and channels of the United States. These are known as Waterborne Commerce Statistics (WCS) and the Lock Performance Monitoring System (LPMS). Each data base, the WCS and the LPMS, provide the Corps and others with the essential information needed for understanding the complex relationships between the physical system, and the vessels or commodities moving on that system.

The LPMS applies to navigation system management and collects, monitors, and analyzes data regarding the use and operation of Federally owned and operated locks and canals. It requires general data about the number of vessels, barges, and tows which move through each lock chamber or canal and about the operation time required for passage of these vessels or tows. It also collects general data about cargos by estimated tonnage and category of commodity. This information is then used for the sizing and scheduling of replacements, the timing of rehabilitation or maintenance actions, and the setting of operation procedures and closures for locks and canals.

Additional general information may also be collected, such as on traffic delays, which might affect the availability of the lock chamber or canal and their operating procedures. The master, captain, or pilot of vessels are required to provide the data identified on ENG Forms 3102b, 3102c, or 3102d, and to provide other data required by the lockmaster or canal operator. Failure to provide this data may result in denial of passage through the lock or canal and in a fine or imprisonment.

The WCS applies to the number, use, and movement of commercial vessels on the navigable waters of the United States, and collects, monitors, and analyzes detailed data regarding such activities. This information is collected on ENG Form 3925 or ENG Form 3925b and is reported monthly for each company vessel or fleet, that operate or are available for operation. This is used for tracking a specific vessel from its point of origin to its ultimate destination, and also indicates times of active and inactive usage. It further provides information on commodity movement on the water from its point of loading to its point of unloading.

On occasion, additional data may be required on ENG Form 3102d to yield a simple check on vessel routing and to verify other statistical information. Also, ENG Forms 3931 and 3932 are used for annual inventory of vessels available for domestic commerce and their characteristics.

Data Utilization

The WCS and the LPMS data bases are the sole government sources for information in the United States on domestic waterborne commerce and lock or canal operation. The Army Corps of Engineers is the agency charged with the collection of this data due to its responsibility for the planning, design, construction, rehabilitation, operation, and maintenance of the inland waterway systems, the Great Lakes, and the channels of the coastal ports.

The aggregate data collected under these programs are published in the annual publications, Waterborne Commerce of the United States, Parts 1-5, Lock Performance Monitoring System Quarterly Reports, and Waterborne Transportation Lines of the United States. Each data base and publication provide essential information for an understanding of the utilization of our Nation's navigation systems and the fleet using these systems. The data bases provide essential information to those with responsibilities over the physical system or to those involved in shipping or moving commodities on the Nation's waterways.

Comments Received

In response to the **Federal Register** publication of the proposed rule on April 10, 1990 (55 FR 13,448-13,451), we did not receive any letters of response within the comment period. Therefore, no public comments are incorporated into the final rule. However, a letter dated May 9, 1990, was received on May 16, 1990 which has been made an informal part of the record. The letter requested that an actual dollar value per vessel be established by the Army Corps of Engineers for cargos handled by the Nation's ports. It was suggested that such information could be used by the Corps as an alternative method of allocation of operation and maintenance funds for such facilities. In addition to being untimely for this rule, the suggestion is also impractical for the following reasons. First, there is no statutory authority to collect and employ such data. Second, the proposed rule of April 10, 1990, did not include a proposal for public or industry comment on the collection and use of value specific cargo data. Accordingly, the adoption of such a requirement in this final rule is improper. Further, the adoption of the proposed requirement could unduly tax the resources of the Corps and private industry which would have to collect or provide the information. Finally, the value of such data probably cannot be offset by its potential for abuse. Under all of these circumstances, the suggested information does not appear to be of benefit to the Government, nor to the public interest.

Data Release Policy

The Army Corps of Engineers' policy on the release of waterborne commercial statistics can be found in 33 CFR 209.320 and will be followed throughout the collection and publication process of the data bases. Data released by the Corps to state and local government agencies, private companies, and the general public will conform with the Paperwork Reduction Act (44 U.S.C. 3507), the Trade Secrets Act (18 U.S.C. 1905), and the Water Resources Development Act of 1986 (Pub. L. 99-662), which amended the River and Harbor Act of 1922 (33 U.S.C. 555).

Enforcement Policy

Notice is given that the Army Corps of Engineers will vigorously monitor and enforce these regulations.

Administrative Procedures

Implementation of 33 U.S.C. 555 requires that the Army Corps of Engineers adopt an administrative procedure for contesting a proposed civil penalty order. We have adopted Class I Administrative Penalty Provisions under the Clean Water Act (33 U.S.C. 1319(g)(1)) which does provide such a procedure. Those provisions were published as a final rule in 54 FR 50708-50712 on December 8, 1989.

Because it is reasonable to maintain an agency-wide and uniform procedure for the notice and assessment of civil penalties, those regulations are referenced to the maximum extent possible. This was done to avoid unnecessary detail on these procedures in this regulation. The specific provisions required by the Clean Water Act regarding public notification, comment period, and state coordination are explicitly excluded from use in the proceedings under this regulation.

The proceeding will be initiated by the Chief of the Waterborne Commerce Statistics Center who will issue a proposed civil penalty order. This order will describe the violation, the amount of the proposed penalty, and the applicable provisions of 33 CFR Part 326. Requests for a hearing will be sent by the recipient to the Director, Water Resources Support Center. The nature of any administrative hearing or proceeding may be either oral or on the record. However, it is anticipated that most of the proceedings will be based upon the written record of the parties. In some cases, an oral hearing may be more appropriate and required.

A final decision on the order will be issued by the Director of the Water Resources Support center.

Classification

The Assistant Secretary of the Army for Civil Works has reviewed this action and has certified that it is not subject to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601-612, since it will not exert a significant economic impact on a substantial number of small businesses or other entities. Further, the Department of the Army has determined that this regulation will not affect the use or value of private property and, therefore, does not require a Takings Implication Assessment under Executive Order 12630. This regulation also has been determined not to be a major rule under Executive Order 12291, and a Regulatory Impact Analysis (RIA) Statement has not been prepared since the final rule does not result in significant adverse economic effects identified in the Executive Order as grounds for a finding of major action. The collection of information contained in this regulation has been cleared by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3507) and assigned control numbers 0710-0006 and 0710-0008.

List of Subjects in 33 CFR Part 207

Navigation regulations

For the reasons set out in the preamble, title 33, chapter II of the Code of Federal Regulations is amended as follows:

PART 207 - [AMENDED]

1. The authority citation for Part 207 is revised to read as follows:

Authority: Secs. 4 and 7 of 28 Stat. 362; 40 Stat. 266; 42 Stat. 1043; and 33 U.S.C. 1, 554, and 555 (as amended by Sec. 919 of the Water Resources Development Act of 1986).

Sections. 207.9, 207.20, 207.50, 207.100, 207.160, 207.180, 207.249, 207.275, 207.300, 207.420, 207.460, 207.470, 207.590, 207.640, 207.680, 207.718, 207.750 [Amended]

Section. 207.390 [Removed]

2. The following sections or paragraphs are removed, and the removed section or paragraph numbers are designated as being reserved:

Sections 207.9(k), 207.20(m), 207.50(m), 207.100(q), 207.160(c), 207.180(c), 207.180(d)(13), 207.249(a), 207.275(q), 207.300(t), 207.390, 207.420(b)(17), 207.460(a)(15), 207.470(o), 207.590(m)(7), 270.640(a)(19), 207.680(c), 207.718(u), 207.750(a)(2), and 207.750(b)(7).

3. Section 207.800 is added to read as follows:

Section. 207.800 Collection of navigation statistics

(a) *Definitions.* For the purpose of this regulation the following terms are defined:

(1) *Navigable waters of the United States* means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark, and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. (See 33 CFR part 329 for a more complete definition of this term.)

(2) *Offenses and Violations* mean:

(i) Failure to submit a required report.

(ii) Failure to provide a timely, accurate, and complete report.

(iii) Failure to submit monthly listings of idle vessels or vessels in transit.

(iv) Failure to submit a report required by the lockmaster or canal operator.

(3) *Leased or chartered vessel* means a vessel that is leased or chartered when the owner relinquishes control of the vessel through a contractual agreement with a second party for a specified period of time and/or for a specified remuneration from the lessee. Commercial movements on an affreightment basis are not considered a lease or charter of a particular vessel.

(4) *Person or entity* means an individual, corporation, partnership, or company.

(5) *Timely* means vessel and commodity movement data must be received by the Waterborne Commerce Statistics Center within 30 days after the close of the month in which the vessel movement or nonmovement takes place.

(6) *Commercial vessel* means a vessel used in transporting by water, either merchandise or passengers for compensation or hire, or in the course of business of the owner, lessee, or operator of the vessel.

(7) *Reporting situation* means a vessel movement by an operator that is required to be reported. Typical examples are listed in the instructions on the various ENG Forms. Five typical movements that are required to be reported by vessel operating companies include the following

examples:

Company A is the barge owner, and the barge transports corn from Minneapolis, MN to New Orleans, LA, with fleeting at Cairo, IL.

(i) *Lease/Charter*: If Company A leases or charters the barge to Company B, then Company B is responsible for reporting the movements of the barge until the lease/charter expires.

(ii) *Interline Movement*: A barge is towed from Minneapolis to Cairo by Company A, and from Cairo to New Orleans by Company B. Since Company A is the barge owner, and the barge is not leased. Company A reports the entire movement of the barge with an origin of Minneapolis and a destination of New Orleans.

(iii) *Vessel Swap/Trade*: Company A swaps barge with Company B to allow Company B to meet a delivery commitment to New Orleans. Since Company A has not leased/chartered the barge, Company A is responsible for filing the report. Company B is responsible for filing the report on the barge which is traded to Company A. The swap or trade will not affect the primary responsibility for reporting the individual vessel movements.

(iv) *Re-Consignment*: Barge is reconsigned to Mobile, AL. Company A reports the movements as originating in Minneapolis and terminating in Mobile. The point from which barge is reconsigned is not reported, only points of loading and unloading.

(v) *Fleeting*: Barge is deposited at a New Orleans fleeting area by Company A and towed by Company B from fleeting area to New Orleans area dock for unloading. Company A, as barge owner, reports entire movements from Minneapolis to the unloading dock in New Orleans. Company B does not report any barge movement.

(b) Implementation of the waterborne commerce statistics provisions of the River and Harbor Act of 1922, as amended by the Water Resources Development Act of 1986 (Pub. L. 99-662), mandates the following.

(1) *Filing Requirements*. Except as provided in paragraph (b)(2) of this section, the person or entity receiving remuneration for the movement of vessels or for the transportation of goods or passengers on the navigable waters is responsible for assuring that the activity report of commercial vessels is timely filed.

(i) For vessels under lease/charter agreements, the lessee or charterer of any commercial vessel engaged in commercial transportation will be responsible for the filing of said reports until the lease/charter expires.

(ii) The vessel owner, or his designated agent, is always the responsible party for ensuring that all commercial activity of the vessel is timely reported.

(2) The following Vessel Information Reports are to be filed with

the Army Corps of Engineers, at the address specified on the ENG Form, and are to include:

(i) Monthly Reports. These reports shall be made on ENG Forms furnished upon written request of the vessel operating companies to the Army Corps of Engineers. The forms are available at the following address: U.S. Army Corps of Engineers, Waterborne Commerce Statistics Center, Post Office Box 61280, New Orleans, Louisiana 70161-1280.

(A) All movements of domestic waterborne commercial vessels shall be reported, including but not limited to: Dry cargo ship and tanker moves, loaded and empty barge moves, towboat moves, with or without barges in tow, fishing vessels, movements of crew boats and supply boats to offshore locations, tugboat moves and movements of newly constructed vessels from the shipyard to the point of delivery.

(B) Vessels idle during the month must also be reported.

(C) Notwithstanding the above requirements, the following waterborne vessel movements need not be reported:

(1) Movements of recreational vessels.

(2) Movements of fire, police, and patrol vessels.

(3) Movements of vessels exclusively engaged in construction (e.g., piledrivers and crane barges). **Note:** however, that movements of supplies, materials, and crews to or from the construction site must be timely reported.

(4) Movements of dredges to or from the dredging site. However, vessel movements of dredged material from the dredging site to the disposal site must be reported.

(5) Specific movements granted exemption in writing by the Waterborne Commerce Statistics Center.

(D) ENG Forms 3925 and 3925b shall be completed and filed by vessel operating companies each month for all voyages or vessel movements completed during the month. Vessels that did not complete a move during the month shall be reported as idle or in transit.

(E) The vessel operating company may request a waiver from the Army Corps of Engineers, and upon written approval by the Waterborne Commerce Center, the company may be allowed to provide the requisite information of the above paragraph (D), on computer printouts, magnetic tape, diskettes, or alternate medium approved by the Center.

(F) Harbor Maintenance Tax information is required on ENG Form 3925 for cargo movements into or out of ports that are subject to the provisions of section 1402 of the Water Resources Development Act of 1986 (Pub. L. 99-662).

(1) The name of the shipper of the commodity, and the shipper's Internal Revenue Service number or Social Security number, must be reported on the form.

(2) If a specific exemption applies to the shipper, the shipper should list the appropriate exemption code. The specific exemption codes are listed in the directions for ENG Form 3925.

(3) Refer to 19 CFR part 24 for detailed information on exemptions and ports subject to the Harbor Maintenance Tax.

(ii) Annual Reports. Annually an inventory of vessels available for commercial carriage of domestic commerce and vessel characteristics must be filed on ENG Forms 3931 and 3932.

(iii) Transaction Reports. The sale, charter, or lease of vessels to other companies must also be reported to assure that proper decisions are made regarding each company's duty for reporting vessel movements during the year. In the absence of notification of the transaction, the former company of record remains responsible until proper notice is received by the Corps.

(iv) Reports to Lockmasters and Canal Operators. Masters of self-propelled non-recreational vessels which pass through locks and canals operated by the Army Corps of Engineers will provide the data specified on ENG Forms 3102b, 3102c, and/or 3102d to the lockmaster, canal operator, or his designated representative in the manner and detail dictated.

(c) Penalties for Noncompliance. The following penalties for noncompliance can be assessed for offenses and violations.

(1) Criminal Penalties. Every person or persons violating the provisions of this regulation shall, for each and every offenses, be liable to a fine of not more than \$5,000, or imprisonment not exceeding two months, to be enforced in any district court in the United States within whose territorial jurisdiction such offense may have been committed.

(2) Civil Penalties. In addition, any person or entity that fails to provide timely, accurate, and complete statements or reports required to be submitted by this regulation may also be assessed a civil penalty of up to \$2,500 per violation under 33 U.S.C. 555, as amended.

(3) Denial of Passage. In addition to these fines, penalties, and imprisonments, the lockmaster or canal operator can refuse to allow vessel passage.

(d) Enforcement Policy. Every means at the disposal of the Army Corps of Engineers will be utilized to monitor and enforce these regulations.

(1) To identify vessel operating companies that should be reporting waterborne commerce data, The Corps will make use of, but is not limited to, the following sources.

(i) Data on purchase and sale of vessels.

(ii) U.S. Coast Guard vessel documentation and reports.

(iii) Data collected at Locks, Canals, and other facilities operated by the Corps.

(iv) Data provided by terminals on ENG Form 3926.

(v) Data provided by the other Federal agencies including the Internal Revenue Service, Customs Service, Maritime Administration, Department of Transportation, and Department of Commerce.

(vi) Data provided by ports, local facilities, and State or local governments.

(vii) Data from trade journals and publications.

(viii) Site visits and inspections.

(2) Notice of Violation. Once a reporting violation is determined to have occurred, the Chief of the Waterborne Commerce Statistics Center will notify the responsible party and allow 30 days for the reports to be filed after the fact. If the reports are not filed within this 30-day notice period, then appropriate civil or criminal actions will be undertaken by the Army Corps of Engineers, including the proposal of civil or criminal penalties for noncompliance. Typical cases for criminal or civil action include, but are not limited to, those violations which are willful, repeated, or have a substantial impact in the opinion of the Chief of the Waterborne Commerce Statistics Center.

(3) Administrative Assessment of Civil Penalties. Civil penalties may be assessed in the following manner.

(i) Authorization. If the Chief of the Waterborne Commerce Statistics Center finds that a person or entity has failed to comply with any of the provisions specified herein, he is authorized to assess a civil penalty in accordance with the Class I penalty provisions of 33 CFR part 326. Provided, however, that the procedures in 33 CFR part 326 specifically implementing the Clean Water Act (33 U.S.C. 1319(g)(4)), public notice, comment period, and state coordination, shall not apply.

(ii) Initiation. The Chief of the Waterborne Commerce Statistics Center will prepare and process a proposed civil penalty order which shall state the amount of the penalty to be assessed, describe by reasonable specificity the nature of the violation, and indicate the applicable provisions of 33 CFR part 326.

(iii) Hearing Requests. Recipients of a proposed civil penalty order may file a written request for a hearing or other proceeding. This request shall be as specified in 33 CFR part 326 and shall be addressed to the Director of the Water Resources Support Center, Casey Building, Fort Belvoir, Virginia 22060-5586, who will provide the requesting person or entity with a reasonable opportunity to present evidence regarding the issuance, modification, or revocation of the proposed order. Thereafter, the Director of the Water Resources Center shall issue a final order.

(4) Additional Remedies. Appropriate cases may also be referred to the local U.S. Attorney for prosecution, penalty collection, injunctive, and other relief by the Chief of the Waterborne Commerce Statistics Center.