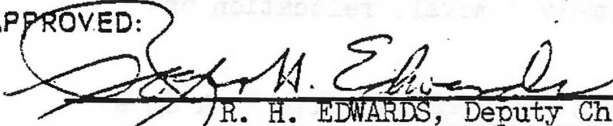


TO: SUPERSEDED BY EB 03-029 EFFECTIVE 6/6/03	<h1>ENGINEERING INSTRUCTION</h1> <p>NEW YORK STATE DEPARTMENT OF TRANSPORTATION</p>
Distribution: <input checked="" type="checkbox"/> Main Office <input checked="" type="checkbox"/> Regions <input type="checkbox"/> Special	Code: <u>EI 82-4</u> Date: <u>1/15/82</u>
APPROVED:  R. H. EDWARDS, Deputy Chief Engr., Facil. Des. Div.	Supersedes:

The purpose of this instruction is to establish a procedure whereby reasonable time schedules can be established with Utility owners for relocating their facilities and avoiding delay to the progress of work under NYS DOT Let contracts. This procedure shall be used on all projects requiring utility relocations.

It is important that the Designer and Utilities Engineer acting jointly as described in Engineering Instruction 73-35 completely identify the utility facilities to be removed, relocated or replaced as early as possible prior to the submission of PS&E to M.O. This is necessary so that the details of these time schedules can be presented to and discussed with the Utility's representative(s) and then included in the contract documents prior to contract bidding.

Authority to require a Utility owner to comply with such time schedules is found in Section 11-102 of the General Obligations Law. (See Attachment A which includes that section of law in its entirety and a three-page synopsis.)

The procedure the Designer and Utilities Engineer should follow to establish time schedules is:

1. After identifying the utility facilities to be removed, relocated or replaced, and discussing time schedules with the Utility owner to accomplish these actions, include as part of the Preliminary Utility Work Agreement, Form HC 140, the Special Note entitled COORDINATION WITH THE UTILITY SCHEDULE. (See Attachment B for a sample copy of the Special Note). This same Special Note covering all utility actions to be performed by the Utility owners is also to be made a part of the contract documents.
2. As soon as you can determine the date on which the contract is expected to be let (this date can be obtained from the Capital Projects Coordination Bureau) send to the Utility owner whose facilities are affected the "Notice to Utility to Remove or Relocate Its Facilities". (See Attachment C for a copy of this Pre-letting Notice, and Attachment D, directions for completing same.) You will note the twofold purpose of this notice in the last paragraph of Attachment D.

Subject: Time Schedules for Relocating Utility Facilities Affected by State Public Construction Contracts

3. Immediately upon award of the contract send to the Utility owner whose facilities are affected the "Notice Pursuant to Section 11-102 of the General Obligations Law and Part 131 of Title 17 of the New York State Code, Rules and Regulations". (See Attachment E for a copy of this Post-Award Notice, and Attachment F, directions for completing same.) The purpose of this notice is to put into effect the liability provisions of Section 11-102 of the General Obligations Law which make a Utility responsible for damages that result from the untimely removal, relocation or replacement of its facilities.
4. In the event the Utility owner either fails to accomplish its work in a timely fashion, or procrastinates so that it appears that it will not complete its work within the time schedule established in the Post-Award Notice, send to the Utility owner the letter, sample copy of which is identified as Attachment G. (See Attachment H for detailed information concerning this letter.)

The Regional Design Engineer is responsible to see that the requirements of this Engineering Instruction are put into effect working jointly with his Designers and Utilities Engineer so that the established time schedule is:

- A. Consistent with the overall project schedule.
- B. Included as a Special Note in the Preliminary Utility Work Agreements, Form HC 140, for all utility relocation being performed by the Utility owner, specifying where and when the facilities will be relocated. The HC 140 is to be executed by the Utility's representative and forwarded to this office before submission of PS&E to M.O. (Ref. Attachment B.)
- C. Included as a Special Note in the contract documents. (Ref. Attachment B.)
- D. Transmitted to the Utility owner in all instances when utility facilities are to be adjusted by the owner, in accordance with requirements of Section 11-102 of the General Obligations Law. (Ref. Attachments C and E.)

This Engineering Instruction does not supersede EI 80-22, Relocation of Utility Poles; rather, this EI addresses all utility facilities, providing the procedure for establishing reasonable time schedules for their relocation. EI 80-22 is to be used when necessary, in addition to this EI.

Attachments

Legislation signed by the Governor and taking effect 9/1/79 (Chapter 717, Laws of 1979) included not only the amending of Highway Law Section 10, Subdivision 24b and identification of utility and facility adjustments qualifying for reimbursement, but the addition of a new section 11-102 to the General Obligations Law which reads as follows:

"11-102. Liability of utilities for compensation for damages caused by interfering with, or delaying the progress of work under state public construction contracts.

1. No utility shall interfere with, or delay the progress of work under any contract with the state department, agency, division or board, for the construction, reconstruction or improvement of any highway, street, road, railroad grade crossing, bridge, tunnel, underpass, overpass or other state contract work, by failing to remove or relocate its poles, wires, cables, conduits, pipes or any other facilities or structures within the time schedule therefor by an agreement or under the terms of an agreement between the department, agency, division or board and the utility, or if no time is fixed by such an agreement or under the terms of such an agreement, within the time fixed by the department, agency, division or board, by notice served upon such utility by such state department, agency, division or board.
2. If such notice is utilized, it shall describe the public improvement and the geographical location, thereof, the date of commencement and the date of completion, if any, provided for by the contract, the contractor's name and address, the manner in which and the extent to which the facilities and structures of the utility obstruct or prevent the contractor from progressing or performing the work comprehended by the contract, and shall fix the date or time within such utility is required to remove or relocate its facilities or structures, specifying the same, in order to provide the contractor with the site when required by the contractor for progressing or performing the work pursuant to such state contract. Such notice shall be in writing and shall be served upon such utility either personally or by certified mail at its principal office or place of business in the county where the work under such contract is to be performed, or, if there be no such principal office or place of business in such county, at the nearest principal office or place of business of such utility, outside of such county.

In the event the utility to whom the aforesaid notice was directed is for any reason unable, within the prescribed period, to remove or relocate said facilities or structures specified in the notice, said utility shall immediately advise said department, agency, division or board and the contractor, in writing, of such inability, and in the same communication so advise said department, agency, division or board, and the contractor of the approximate date that such removal or relocation of facilities or structures could be effected; and shall further state the basis for the inability of said utility to remove or relocate said facilities or structures within the time specified by the notice served thereon by said department, agency, division or board. The department, agency, division or board, after examining and considering the utility's basis for establishing a different schedule for such removal or relocation, shall, if such basis is reasonable, establish and notify the utility of a revised schedule for completing such removal or relocation.

3. In cases where the utility has been reimbursed for removal, relocation, replacement or reconstruction pursuant to subdivision twenty-four-b of section ten of the highway law, a utility failing to complete the removal or relocation of such structures or facilities within a period of thirty days beyond the time fixed therefor by the latest time schedule established in accordance with this section, shall be liable and responsible to any such contractor for any damages, direct or consequential, sustained by any such contractor as the result thereof, in an action to be brought by such contractor against such utility in a court of competent jurisdiction within two years from the time fixed for the removal or relocation of such structures or facilities. If an action is commenced against a utility, as heretofore provided, said utility may interpose in its answer in such action any defense available under the provisions of the civil practice law and rules. The unreasonableness of the time schedule imposed by the state department, agency, division or board shall be an absolute defense by the utility to any such action by the contractor. If, in any such action, the utility is found to owe nothing to the contractor, or if an offer of settlement is made by the utility which is not accepted by the contractor and the resulting verdict against the utility is less than the offer of settlement, then in either such event the total cost of the utility of litigation, including reasonable attorney's fees, shall be paid to the utility by the contractor."

SYNOPSIS

SECTION 11-102 OF THE GENERAL OBLIGATIONS LAW

Section 11-102 of the General Obligations Law says that:

IF the Department provides NOTICE to a Utility that a Department project requires the removal or relocation of the Utility's facilities, and

IF the NOTICE provides a reasonable date by which time the removal or relocation must be accomplished,

THEN the Utility will be held liable to the State for damages caused by unreasonable delays in removing or relocating its facilities.

Say, for example, that a Utility is notified of a reasonable date by which it must relocate its facilities, and it neglects to do so in accordance with that date. Assume, also, that the Utility's failure to meet the deadline in a timely fashion delays the contractor and the contractor incurs additional costs related to that delay. If the Department must, as a result, pay the contractor more than the contract price, the Department can seek reimbursement from the Utility. Another example would be where the Utility fails to remove or relocate its facilities altogether. If, as a result, the Federal government will not accept the project and withholds final payment, the Department can seek reimbursement from the utility for damages.

To trigger Section 11-102, the NOTICE to the Utility must be in writing and either personally served upon the Utility or sent by certified mail. Should the Region, for whatever reason, prefer to hand deliver the NOTICE initially, it is advisable to follow it up by sending a copy by certified mail. Whether the NOTICE is hand delivered or mailed, it should be directed to the Utility's principal office or place of business in the county where the Department's project is located. If the project spans more than one county, more than one NOTICE must be sent out. If the Utility does not have any office in the county of the project, the NOTICE should be sent to the Utility's principal office or place of business nearest the project.

The NOTICE must:

- . describe the public improvement;
- . describe the geographical location of the public improvement;
- . provide the date of commencement and date of completion, if any provided by the contract;
- . provide the contractor's name and address;

- . identify the structures or facilities that must be removed or relocated;
- . specify the manner in which and the extent to which the facilities and structures of the Utility (1) obstruct or prevent the contractor from progressing or performing the work comprehended by the contract, or (2) conflict with the clear roadside policy of the State, or (3) do not conform with any other State or Federal policy, rule or regulation, or (4) will interfere with the safe operation of the highway or the safety of the travelling public either during or after the Department's project;
- . fix the date or time within which the Utility is required to remove or relocate its facilities/or structures.

The time set forth in the NOTICE as the period within which the removal or relocation must take place should be established in the following manner:

- . IF the facilities are owned by a Utility that has signed the Department's General Operating Agreement (to date this includes NYS Electric & Gas Corp., Niagara Mohawk Power Corp., and the New York Telephone Company),

THEN the date should be established mutually by the Department and the Utility in accordance with the procedure set out in the General Operating Agreement,

UNLESS the Department and Utility are unable to reach an agreement, in which case the Department should unilaterally establish a deadline date.

- . IF the facilities are owned by a Utility that has not signed the Department's General Operating Agreement,

THEN the date may be established unilaterally by the Department; however, it is advisable to contact the Utility anyway and attempt to set a mutually agreed upon date.

Once the Utility gets the NOTICE, it may determine that it is unable to remove or relocate the facilities specified in the NOTICE within the prescribed period. For example, the occurrence of an emergency may require the Utility to devote all available manpower to the correction of the emergency. When this happens, the Utility must immediately advise the Department and the Department contractor, in writing, of its inability to act in accordance with the NOTICE, and at the same time must provide an explanation for its inability and advise the Department and contractor of the date by which it feels that the removal or relocation can be accomplished. This correspondence from the Utility to the Department

and contractor does not, in and of itself, postpone the deadline date. The only entity that may revise the schedule is this Department. If, after reviewing the Utility's correspondence the Department determines that the Utility's basis for requesting a different schedule is reasonable, then the Department shall establish and notify the Utility of the revised schedule for completing such removal and relocation. The revised deadline date does not necessarily have to be the same date that the Utility recommended, but it should be a reasonable date under the circumstances. If the Department determines that the Utility's basis for requesting a different schedule is unreasonable, then the Department should notify the Utility of that determination.

It's very important that the deadline date established by the Department be reasonable. If the date set is not reasonable, a court will not hold the Utility liable for damages incurred as a result of the delay in its removal or relocation of the facilities or structures. Hence, the Department might be put in the unpleasant predicament of being held liable to the contractor for damages incurred by the contractor, but not be entitled to reimbursement from the Utility.

Section 11-102 does one more thing. It enables the Department's contractor to bring a direct suit against Utilities, in certain instances, to recover damages caused by the Utility's untimely removal or relocation of its facilities. However, the only time that the contractor can directly sue a Utility pursuant to this Section is when the Utility has been reimbursed by this department, pursuant to Section 10, subdivision 24-b, for relocating or removing its facilities. In those situations, the contractor may still sue the State.

Sample Copy - Include in Contract Documents and as Attachment to Form HC 140

SPECIAL NOTE

COORDINATION WITH THE UTILITY SCHEDULE

The Contractor must coordinate his schedule of operations with the various Utility owners involved with the project and shall verify utility information found in the contract documents. Utility revisions required by the various Utility owners in connection with this project include:

Mohawk-Hudson Electric and Gas Corporation

115KV Aerial Transmission line relocation is shown on the plans. The existing towers and lines are in conflict with the proposed work. Tower relocations are presently underway and are scheduled to be completed within 6 months after contract award.

Aerial Electric Distribution Line relocation is shown on the plans and consists of poles in conflict with the proposed work. Pole relocations are scheduled to be completed within 3 months after contract award.

6" Dia. HP Gas Main relocation is shown on the plans. The existing gas main is to be abandoned and purged before the Contractor proceeds with demolition of the structure; in accordance with company policy, the gas main will not be removed from service between 1 October and 1 May. Gas main relocation is scheduled to be completed within four months after contract award.

New York Telephone Company

Utility Pole relocations are shown on the plans. They consist of poles in conflict with the proposed work. Pole relocations are scheduled to be completed within 3 months after contract award.

Buried Phone Cable is shown on the plans and will be in conflict with the proposed work. Replacement of buried cable is scheduled to begin 4 months after award, or upon completion of clearing and grubbing by the Contractor (whichever occurs later) and is scheduled to be completed within 2 months thereafter.

Village of North Bay

Aerial Fire Alarm System is shown on the plans and is in conflict with the proposed work. Relocation is scheduled to be completed within 3 months after contract award.

Village of North Bay

A new 12" Sanitary Sewer crossing the project at Stations 36+00± and 42+50± will be constructed with Village forces or by Village let contract during the course of the contract. The Contractor is directed to contact the Village in order to coordinate the progress of his work with Village work.

Texas Eastern Gas Corporation

This 24" HP Gas Transmission Line relocation is shown on the plans and will be installed after the Contractor excavates the roadway to subgrade at the gas line crossing. This installation will require 2 months and can begin no sooner than 8 months after the award of the contract because of time constraints on the Utility. Tie-in of the replacement line with the existing line will require two weeks duration and can not take place between 1 October and 1 May. Therefore, this relocation is scheduled to be completed no earlier than 21 May 19___. The Contractor is to coordinate directly with the Utility owner before crossing this gas line with any equipment prior to its relocation.

Redfield-Newcomb Telephone Company

Relocated Communication Lines are not shown on the plans. The Contractor is to contact Redfield-Newcomb Telephone Company for details of proposed relocation.

Deposit-Walden Gas Company

The exact location of Relocated Gas Lines is unknown at this time. The Contractor is to contact Deposit-Walden Gas Company for further details.

Fairfield County Water Authority

The 16" and 20" Water Lines relocations are shown on the plans. Relocation of the 16" line is presently underway with Authority forces and is scheduled to be completed within 3 months after award. Relocation of the 20" line is scheduled to be let to contract by the owner coincidentally with the award of the State contract and is scheduled to be completed within 4 months thereafter.

In addition to the above itemized revisions, other relocations may become necessary during the construction phase as a result of more precise location data or other changes that might develop. These relocations are to be performed by the Utility owners with coordination by the Contractor.

NEW YORK STATE DEPARTMENT OF TRANSPORTATION
REGIONAL OFFICE #

Attachment C
1 of 4
1/82

PRE-LETTING
NOTICE TO UTILITY TO REMOVE OR RELOCATE ITS FACILITIES

PROJECT: Capital Project Identification No. _____ Date: _____
FA Project Number _____
County _____

Name and Address of Utility

The New York State Department of Transportation hereby advises you that your facilities or structures, as specified in Appendix A, will have to be removed or relocated within _____ days from the date of the award of the contract for the subject project to provide the Department's contractor with a clear site for progressing or performing work comprehended by the contract and/or to conform to State or Federal policy, rule or regulation concerning the safe operation of the highway and the safety of the travelling public. The contract is expected to be let on _____, 19____, and will be awarded within forty-five (45) days of that date.

Once the contract has been awarded, the New York State Department of Transportation will notify you of the exact date by which your facilities or structures must be removed or relocated, as well as the name and address of the contractor to whom the award was made.

Description of Public Improvement: _____

Geographical Location of Public Improvement: _____

NOTICE

Manner in which and extent to which the facilities and structures identified in Appendix A conflict with construction or the clear roadside policy of the State, or in any other way interfere with the safe operation of the highway or the safety of the travelling public: _____

In the event that you are unable, within the prescribed period, to remove and relocate the facilities or structures identified in Appendix A, you must immediately advise the New York State Department of Transportation, in writing, of such inability and, in the same communication, you must provide the approximate date that such removal or relocation of facilities or structures could be effected, and the basis for your inability to remove or relocate the identified facilities or structures within the time specified above. The department will examine and consider your basis for establishing a different schedule for the removal or relocation and, if the basis is reasonable, will establish and notify you in writing of a revised schedule for completing the removal or relocation. However, until such time as you receive notification from the Department advising you that the schedule is revised, the above-provided schedule is in effect.

If your failure to remove or relocate your facilities or structures within the latest time schedule established by the Department delays the completion of the project by interfering with the contractor's timely progress under the subject contract or preventing final approval by FHWA, you shall be liable under Section 11-102 of the General Obligations Law, for any damages, direct or consequential, resulting therefrom in addition to any liability that may be imposed under common law and the laws of the State of New York.

NOTICE

Furthermore, if you are eligible for reimbursement pursuant to subdivision 24-b of Section 10 of the Highway Law for the removal or relocation of your facilities in connection with this project, the contractor may commence a direct action against you, in accordance with the time limitations established in Section 11-102 for damages incurred as a result of the delay.

Please refer any inquiries, and direct any written correspondence on this matter to _____ at:

address and telephone number

Very truly yours,

Director, Region #
New York State
Department of Transportation

NOTICE
APPENDIX A

Identification of facilities and structures that must be removed or
relocated:

DIRECTIONS FOR COMPLETING "NOTICE TO UTILITY
TO REMOVE OR RELOCATE ITS FACILITIES"

(PRE-LETTING NOTICE)

WHEN SHOULD THE SUBJECT NOTICE BE USED?

This NOTICE should be used whenever the Department has determined in accordance with Department policy that it is necessary for a Utility to remove, relocate or replace its facilities in connection with a Department project.

WHEN IS THE NOTICE TO BE SENT?

The NOTICE should be sent to the Utility as soon as you can determine the date on which the contract is expected to be let. It cannot be any earlier since you must provide this date in the NOTICE. Once you know the letting date, the sooner you send out the NOTICE, the better.

TO WHOM IS THE NOTICE TO BE SENT?

This NOTICE is to be sent to any Utility company, public or private, whose facilities or structures (either on or off the right-of-way) must be removed, relocated or replaced, for whatever reason, in connection with a Department project. The removal, relocation or replacement of the utility facilities may, for example, be necessary:

- to provide the Department's contractor with site to perform work under a Department contract, or
- to eliminate a conflict, that would otherwise exist upon completion of a Department project, with the clear roadside policy of the State, or
- to prevent any other interference with the safe operation of the highway or the safety of the travelling public either during or after the Department's project.

HOW IS THE NOTICE TO BE SENT?

Send the NOTICE by certified mail. Keep the return receipt in your file. In the event that there is litigation on this matter, the receipt will serve as proof that the Utility did actually receive the NOTICE.

DIRECTIONS

WHERE SHOULD THE NOTICE BE SENT?

Send the NOTICE to the Utility at its principal office or place of business in the county where the work under the subject contract is to be performed. If there is no such principal office or place of business in that county, send the NOTICE to the nearest principal office or place of business of the Utility outside the county.

NOTE: If the work is to be performed in more than one county, more than one NOTICE may have to be sent. .

HOW IS THE DATE OR TIME WITHIN WHICH THE UTILITY MUST REMOVE OR RELOCATE ITS FACILITY TO BE FIXED?

If the Department has a General Operating Agreement with the Utility, the time schedule is to be established in accordance with the procedure provided therein. To date, DOT has such an agreement with only three companies: NYS Electric & Gas Corp., Niagara Mohawk Power Corp., and the New York Telephone Company.

If there is no General Operating Agreement, the Department may fix the schedule unilaterally, but it would be preferable for the Region to establish a deadline after first consulting with the Utility.

NOTE: The purpose of this NOTICE is twofold. First, it serves to put the Utility on notice of the time within which it will be expected to adjust its facilities. Second, it documents the Department's efforts to seek a timely removal, relocation or replacement of the utility facilities. Consequently, it should be sent out whether or not the New York State Department of Transportation and the Utility are in full agreement about whether the relocation is necessary.

NEW YORK STATE DEPARTMENT OF TRANSPORTATION
REGIONAL OFFICE #

POST-AWARD

NOTICE PURSUANT TO SECTION 11-102 OF THE GENERAL OBLIGATIONS LAW AND
PART 131 OF TITLE 17 OF THE NEW YORK STATE CODE, RULES AND REGULATIONS

PROJECT: Capital Project Identification No. _____ Date: _____
Contract Number _____
FA Project Number _____
County _____

Name and Address of Utility

Pursuant to Section 11-102 of the General Obligations Law and Part 131 of Title 17 of the New York State Code, Rules and Regulations, the New York State Department of Transportation hereby formally advises you that your facilities or structures, as specified in Appendix A, must be removed or relocated by _____, 19____, to provide the department's contractor with a clear site for progressing or performing work under the subject contract and/or to conform to State or Federal policy, rule or regulation concerning the safe operation of the highway and the safety of the travelling public.

Description of Public Improvement: _____

Geographical Location of Public Improvement: _____

NOTICE

Date of commencement and date of completion of the subject contract:

The Contractor has been directed to commence work by _____ .

The date of completion of the work, as provided in the subject contract, is _____ .

Contractor's name and address:

Manner in which and extent to which the facilities and structures identified in Appendix A conflict with construction or the clear roadside policy of the State, or in any other way interfere with the safe operation of the highway or the safety of the travelling public: _____

In the event that you are unable, within the prescribed period, to remove and relocate the facilities or structures identified in Appendix A, you must immediately advise both the New York State Department of Transportation and the contractor, in writing, of such inability and, in the same communication, you must provide the approximate date that such removal or relocation of facilities or structures could be effected, and the basis for your inability to remove or relocate the identified facilities or structures within the time specified above. The department will examine and consider your basis for establishing a different schedule for the removal or relocation and, if the basis is reasonable, will establish and notify you in writing of a revised schedule for completing the removal or relocation. However, until such time as you receive notification from the Department advising you that the schedule is revised, the above-provided schedule is in effect.

NOTICE

If your failure to remove or relocate your facilities or structures within the latest time schedule established by the Department delays the completion of the project by interfering with the contractor's timely progress under the subject contract or preventing final approval by FHWA, you shall be liable under Section 11-102 of the General Obligations Law, for any damages, direct or consequential, resulting therefrom in addition to any liability that may be imposed under common law and the laws of the State of New York.

Furthermore, if you are eligible for reimbursement pursuant to subdivision 24-b of Section 10 of the Highway Law for the removal or relocation of your facilities in connection with this project, the contractor may commence a direct action against you, in accordance with the time limitations established in Section 11-102 for damages incurred as a result of the delay.

Please refer any inquiries, and direct any written correspondence on this matter to _____ at:

address and telephone number

Very truly yours,

Director, Region #
New York State
Department of Transportation

NOTICE
APPENDIX A

Identification of facilities and structures that must be removed or
relocated:

DIRECTIONS FOR COMPLETING "NOTICE PURSUANT TO
SECTION 11-102 OF THE GENERAL OBLIGATIONS LAW
AND PART 131 OF TITLE 17 OF THE NEW YORK STATE
CODE, RULES AND REGULATIONS"

(POST-AWARD NOTICE)

WHEN SHOULD THE SUBJECT NOTICE BE USED?

This NOTICE should be used whenever the Department has determined in accordance with Department policy that it is necessary for a Utility to remove, relocate or replace its facilities in connection with a Department project.

WHEN IS THE NOTICE TO BE SENT?

The NOTICE should be sent to the Utility immediately upon award of the contract. It cannot be any earlier since you must include, among other things, the contractor's name and address. However, the sooner that you can send it after the award, the better.

TO WHOM IS THE NOTICE TO BE SENT?

This NOTICE is to be sent to any Utility company, public or private, whose facilities or structures (either on or off the right-of-way) must be removed, relocated or replaced, for whatever reason, in connection with a Department project. The removal, relocation or replacement of the utility facilities may, for example, be necessary:

- to provide the Department's contractor with site to perform work under a Department contract, or
- to eliminate a conflict, that would otherwise exist upon completion of a Department project, with the clear roadside policy of the State, or
- to prevent any other interference with the safe operation of the highway or the safety of the travelling public either during or after the Department's project.

HOW IS THE NOTICE TO BE SENT?

Send the NOTICE by certified mail. Keep the return receipt in your file. In the event that there is litigation on this matter, the receipt will serve as proof that the Utility did actually receive the NOTICE.

DIRECTIONS

WHERE SHOULD THE NOTICE BE SENT?

Send the NOTICE to the Utility at its principal office or place of business in the county where the work under the subject contract is to be performed. If there is no such principal office or place of business in that county, send the NOTICE to the nearest principal office or place of business of the Utility outside the county.

NOTE: If the work is to be performed in more than one county, more than one NOTICE may have to be sent.

HOW IS THE DATE OR TIME WITHIN WHICH THE UTILITY MUST REMOVE OR RELOCATE ITS FACILITY TO BE FIXED?

If the Department has a General Operating Agreement with the Utility, the time schedule is to be established in accordance with the procedure provided therein. To date, DOT has such an agreement with only three companies: NYS Electric & Gas Corp., Niagara Mohawk Power Corp., and the New York Telephone Company.

If there is no General Operating Agreement, the Department may fix the schedule unilaterally, but it would be preferable for the Region to establish a deadline after first consulting with the Utility.

In any case, the date provided in this NOTICE should be consistent with any date that may have been stipulated in the HC 140.

NOTE: The purpose of this NOTICE is to trigger the liability provisions of 11-102 of the General Obligations Law which make a Utility responsible for damages that result from the untimely removal, relocation or replacement of its facilities. It should, by no means, be your first transmittal to the affected Utility. By the time this NOTICE goes out, you should have already had any necessary meetings with the Utility, ironed out any difficulties or differences of opinion, and advised the Utility of the date by which its facilities must be relocated. The NOTICE is simply a final and formal step in the process. Note, also, that this NOTICE is to be sent out whether or not New York State Department of Transportation and the Utility are in full agreement about whether the relocation is necessary.

Sample letter to Utility owner to be used when NYSDOT has reason to anticipate that the Utility will not meet the deadline date provided in the Post-Award Notice (Note: It can be modified for use where the deadline date has actually passed.)

NEW YORK STATE DEPARTMENT OF TRANSPORTATION
REGIONAL OFFICE #

PROJECT: Capital Project Identification No. _____ Date: _____
Contract Number _____
FA Project Number _____
County _____

Name and address of Utility

In accordance with Section 11-102 of the General Obligations Law, the New York State Department of Transportation advised you, by Notice dated _____, 19____, that facilities or structures specified in Appendix A therein would have to be removed or relocated by _____, 19____, to provide the Department's contractor with a clear site for progressing or performing work under the subject contract and/or to conform to State or Federal policy, rule or regulation concerning the safe operation of the highway and the safety of the travelling public.

As of the date of this letter, the removal or relocation of the facilities or structure identified in the enclosed Appendix A has not commenced (use original Appendix A and simply cross out those facilities that have already been relocated). Furthermore, we have reason to believe (based on the latest possible starting date _____ provided by you) _____ (based on statements made by _____ in conversation of _____, 19____ with _____) (based on statements made by _____ in letter dated _____, 19____, directed to _____) that the removal or relocation of the facilities or structures identified herein (will not) (can no longer) be accomplished in a timely fashion.

As you have not provided us (with any basis) (with a reasonable basis) for establishing a later schedule for the necessary removal or relocation, you will be held liable for damages, direct and consequential, resulting from your inaction.

By copy of this letter we are requesting our Office of Legal Affairs to seek a court order directing you to (remove) (relocate) your facilities or structures forthwith.

Any written correspondence on this matter should be directed to

Darrell W. Harp
Office of Legal Affairs
State Campus, Bldg. 5, Rm. 509
Albany, New York 12208
Telephone: 518/457-2411

with a copy to my attention.

Very truly yours,

Director, Region #
New York State
Department of Transportation

cc: Darrell Harp, Assistant Commissioner

DIRECTIONS FOR USE OF FOLLOW-UP LETTER .
TO UTILITY OWNER

WHEN SHOULD THE LETTER BE USED?

This LETTER should be used whenever the Department has determined that it appears the Utility owner has failed or does not intend to take the necessary action so that utility facilities will be removed or relocated within the time schedule established for that action as included in the POST-AWARD NOTICE previously sent to the Utility.

WHEN IS THE LETTER TO BE SENT?

The LETTER should be sent to the Utility owner immediately after the starting date for removing or relocating its utility facilities passes without work having begun, or at such time as the Department has good reason to suspect that the Utility does not intend to act in a timely fashion.

HOW IS THE LETTER TO BE SENT?

Send the LETTER by certified mail. Keep the return receipt in your file. In the event that there is litigation on this matter, the receipt will serve as proof that the Utility did actually receive the LETTER.

WHERE SHOULD THE LETTER BE SENT?

Send the LETTER to the Utility at its principal office or place of business in the county where the work under the subject contract is to be performed. If there is no such principal office or place of business in that county, send the LETTER to the nearest principal office or place of business of the Utility outside the county.

NOTE: If the work is to be performed in more than one county, more than one LETTER may have to be sent.

HOW IS THE ISSUANCE OF THE LETTER TRIGGERED?

The Regional Utilities Engineer, through appropriate and timely input from the Engineer-in-Charge, should be responsible for monitoring the action (or lack of action) being taken by the Utility owner to comply with the Department's Time Schedule Notice. He should be familiar with the minimum period of time it will take the Utility to accomplish the necessary work (e.g., information to be provided by the Utility), and with that information in hand, the Department will be able to establish the latest date by which the Utility owner could feasibly begin to proceed with the work and still finish it according to schedule. Note that the responsibility of day-to-day schedule coordination continues to rest with the Utility and Contractor.

At the time the Region sends the LETTER to the Utility owner, the Region should immediately forward to the Office of Legal Affairs:

- Copies of all correspondence with the Utility owner
- The Pre-Letting Notice
- The Post-Award Notice
- A right-of-way map showing the location of the utility facilities, the existing highway boundary, and right-of-way limits. (If the project involves acquisition of Utility property rights, these limits must be shown.)
- The subject follow-up LETTER

The Office of Legal Affairs would then be in a position to request the Attorney General to take appropriate action through the courts.