

Section 408 Requests to Alter USACE Projects

**EC 1165-2-220
dated 10 September 2018**

**SWD Brief
June 12th 2019**



Purpose of Briefing

Provide an overview of the new Section 408 policy, including key changes since prior EC.



Examples of Section 408 Activities



Dredging to widen/deepen channels and harbors



Road or utility crossing of levees and channels



Armoring or modifications to beach fill



Non-federal hydropower



Levee raises and improvements



Who can request a Section 408 permission?

- Any entity external to USACE who wants to “alter” a USACE Civil Works project.
 - ▶ Other federal agencies
 - ▶ Private companies or individuals
 - ▶ Local government
 - ▶ Tribes
 - ▶ Project Sponsors



Applicability of Section 408

- In general, Section 408 applies to permanent or temporary actions that build upon, alter, improve, move, occupy, or otherwise could affect an authorized USACE Civil Works projects
- Geographical Limitations
 - ▶ Project real property
 - ▶ For navigable waters: USACE project boundaries; and at the districts discretion, the vicinity of the USACE project only when there is the potential to effect the project



Background

- Section 14, Rivers and Harbors Act 1899, as amended
- 33 USC 408 (Section 408)
- Provides USACE authority to grant permission to alter a USACE civil works project if
 1. Does not impair usefulness of the project
 2. Not injurious to the public interest



Evolving Process

- The Section 408 law was passed in 1899, but amended in 1985 to allow permanent alterations
- 2006 – USACE first guidance, case specific
- 2014 – first comprehensive policy (first EC)
- 2016 – first year direct appropriations received and formal tracking begins (1200-1500 requests per fiscal year)
- WRRDA 2014, WRDA 2016, and WRDA 2018 included related legislative requirements/amendments



Interim Guidance

- Nov 2016 – delegated several HQ level decisions to Divisions.
- Jun 2017 – clarified application of 408 related to “navigable waters” reducing number of activities needing 408 permission.
- Jun 2017 – issued guidance to implement contributed funds authority in WRDA 2016



Interim Guidance

- Aug 2017 – District Commanders now have authority to delegate their 408 decisions.
- Jan 2018- Removed 60% design criteria, Statement of No Objection guidance, discussed new timelines
- Aug 2018- Strategy for Synchronization of the Regulatory and 408 Programs



Engineer Circ. (EC)-10 Sep 2018

- New publication number: EC 1165-2-220
- EC 1165-2-220 superseded EC 1165-2-216 and interim guidance
- Valid for two years after published
- At two years:
 - ▶ Must be turned into an Engineer Regulation or
 - ▶ Reissued as another EC.
 - ▶ Short-term extension of a current EC may be possible



Significant Improvements

(since 2014 EC)

- Delegations and approval levels
- Narrowing when the EC process applies
 - ▶ Not needed for Sponsor O&M/repairs
 - ▶ Nav Servitude/Submerged Lands
 - ▶ Distinguishes between Section 408 and Real Estate
- Synching Regulatory and Section 408 decisions when both are needed
- Timelines and written notifications
- Clarity between USACE versus requester requirements



EC Revision

- Significant change -- when there is a Regulatory and 408 decision needed for a single activity the Corps will provide the requester one single transmittal with both decisions. In certain cases (Regulatory standard permit) this will require one lead office for environmental compliance; one decision document; and one decision maker for both of the Reg and 408 actions



Decision Level

- **All Section 408 decisions are delegated to Divisions and District.** Majority of Section 408 requests decided at the district (District Commanders can delegate decisions to a district division chief)
- **Division Commanders the decision-maker:**
 - If Safety Assurance Review is required (life safety)
 - If non-federal hydropower facility
 - If crediting is being sought
 - If potential to affect a current USACE study
 - If changes how USACE project authorization is met
 - If involves Navigation assumption of maintenance



HQ Concurrence Required

- No more final 408 decisions at HQ
- HQ Chief of Planning must concur prior to decision if
 - ▶ proposed 408 affects a current GI or other USACE study
 - ▶ changes how authorization is met.
- HQ Chief of Nav must concur prior to decision on Section 204(f)



No Separate Section 408 Required

- Project sponsor activities (district concurrence may be required) if activity is
 - ▶ In O&M manual;
 - ▶ Restores to same physical dimensions/design; or
 - ▶ Drilling for O&M (drilling plan required)
- Some USACE Real Estate Outgrants*
- Section 10 Regulatory Permit, in Navigation appendix (if scopes are identical)
- Actions under CERCLA
- Non-federal Construction of a USACE project (Section 204) if authorized



Real Estate/408 Relationship

- Activity occurs entirely on USACE real property and has Report of Availability or part of Project Master Plan
 - ▶ No separate Section 408 is needed, these processes meet intent and requirement of Section 408
- All other situations require a Section 408
 - ▶ Activity occurs partially on USACE real property and property owned by others
 - ▶ Real estate action does not involve a Report of Availability or is not part of Project Master Plan
 - ▶ Real estate action becomes included in the Section 408 comprehensive analysis
- Same approach above applied when permit/decision issued by another Fed agency (BLM/FERC)



Regulatory/408 Relationship

- Proposed activity requires 408/Standard permit
 - ▶ One office leading environmental compliance
 - ▶ One decision document
 - ▶ One deciding official
 - ▶ One transmittal letter to requester
- Proposed activity requires 408/other Reg permit
 - ▶ One transmittal letter to requester
- (App. G) Address when complete overlap of scope between Section 10 and 408



Additional Guidance

- August 2018 Memorandum-
- USACE will follow a phased approach to implement actions toward establishing a single point of initial contact for all permitting inquiries; establishing "One USACE Decision"; linking the Regulatory and 408 databases; and establishing one public-facing avenue for the submittal of Regulatory and 408 permit applications, including serving permit status information to the public. Regulatory Chiefs will serve as initial points of contact for permitting inquiries. Divisions and districts will develop standard operating procedures (SOPs) or modify existing SOPs for internal processes to be followed to synchronize the evaluation of Regulatory and 408 applications, and coordinate decisions per the "One USACE Decision" policy. HQUSACE will further coordinate to link the Regulatory and 408 databases and develop the integrated public-facing website.



Memorandum Direction- Phase 1 to be complete by 31 MAR 2019

- Single POC for all permitting- Reg Chief
- “One USACE Decision” for permitting that requires both 404 and 408
- Link 404 and 408 Databases
- Draft SOPs at SWD and Districts



Memorandum Direction- Phase 2 to be complete by 30 SEP 2019

- Full implementation of “One Door to Corps Permitting”
- Finalize SOPs at SWD and Districts



Phase 3- to be complete by 30 Sep 2020

- Self assessment of how the SOPs are working
- Modify procedures based on lessons learned



Overall Process and Timelines

Options

Categorical Permission

Single Phase
(one-time submittal)

Multi-Phase
(milestone submittals)

Basic Steps

Step 1: Completeness Determination
(30 days)

Step 2: USACE Review and Decision
(90 days*)

Step 3: Final Notification
(must be done within same 90 days*)

Step 4: Construction Oversight



*If decision goes beyond 120 days, Congressional reporting required



Categorical Permission

- Categories of activities that generally have similar technical requirements for review and similar impacts to the environment (i.e. pipe crossings, utility poles, etc)
- If the Section 408 request is consistent with the terms and conditions of the categorical permission, then the alteration can be validated (approved)
- Validation of categorical permissions are subject to the same timelines as a single-phase review



(new) Timelines

- Emphasize intent of timely review and responsiveness to requesters
- Completeness Determination within 30 days, applies anytime USACE receives information related to a Section 408 request – use the Basic Requirements to determine completeness
- Review and Decision Phase within 90 days from completeness determination
 - ▶ Provide written notification if 90 days can't be met
 - ▶ If schedule is beyond 120 days, Congressional reporting required
- Dates will be tracked in the Section 408 database



(new appendix) Template letters for different notification requirements are provided 

Standards for USACE Review

- Public Input – In general all Section 408 requests will require a public notice
 - ▶ Coordinate content and timing of public notice for multiple purposes (Regulatory, EO11988, environmental compliance)
- USACE review process must follow a review plan
 - ▶ Review plans are approved at the same level as the Section 408 decision-maker, except for Procedural Review Plans/Safety Assurance Reviews
- Summary of Findings
 - ▶ Summarizes rationale and determinations that the alteration would not be injurious to the public interest and would not impact the usefulness of the project
 - ▶ May be integrated with the NEPA decision document (FONSI or ROD) for efficiency

▪ Standard terms and conditions



Basic Requirements

- Statement of No Objection (if requester not the project sponsor)
 - ▶ Replaces “written concurrence” requirement
 - ▶ Intent to ensure sponsor is aware of the Section 408 request and does not object to the request being submitted
 - ▶ Not required if requester has eminent domain authority
- Technical Analysis and Design
 - ▶ Meet USACE Standards
 - ▶ Changed requiring Quality Control Plan to certification for quality control.
 - ▶ SAR, district E&C chief makes the determination, discretion for posting on a website
 - ▶ 60% design no longer a minimum (district determines appropriate level case by case)



Basic Requirements, cont.

- Environmental Compliance
 - ▶ information and documentation to support compliance with environmental laws (NEPA, ESA, NHPA, etc); requestor and district should coordinate information requirements prior to submission
- Real Estate
- Update of O&M requirements
- Once all of the basic requirements have been satisfied, the Section 408 request is considered “complete”.
 - ▶ Basic requirements submitted all at once for a single-phased review or
 - ▶ Could be submitted at various times during multi-phased review



Scenarios for Multi-Phased Review

- Large-scale plan consisting of multiple smaller construction phases.
 - ▶ Milestones may be for review of the whole conceptual plan and then for each separable construction phase.
- Complex or advanced engineering and design needed for review and decision
 - ▶ Milestones are for the same construction phase, but each milestone involves progressively advancing design



More on Multiphase Reviews

- Initial submittal must contain information at the conceptual level for the final Section 408 alteration.
- Establish pre-determined milestones for submittals. Milestones should cumulatively result in a complete 408 submittal.
- Each milestone submittal will adhere to notification timelines.
- Each milestone submittal will have a written “decision” based on the information provided.



408 Funding Options

- Remaining Items (not ICW) – Budgeting is better informed for coming FYs, but is still limited
- Funding agreements with applicants



FY19/FY20 Funding Process

- Funds requested using RMC's Funding Request System
- MIPRs to end sometime in FY19 (new process has not been determined)
- FY19 Budget - \$8.5M + \$500,000 carryover
- FY20 budget - \$8.5M – **Early number not final**



FY19/FY20 Funding Process

- The RMC is looking at 3 potential methods for replacing the use of MIPRs.
- 1. Cross Charge Labor Code (CCLC). The RMC would set up labor codes for each Org Code.
- 2. Reallocation. IWR/HQ would send each district funds via a reallocation and the district would establish their own labor codes.
- 3. Work Allowance. District would be sent funds by FAD/WAD two or three times a year.



Funding Agreements for 408 Reviews

- (new), Section 1156(a)(2) of WRDA 2016
 - ▶ Amends Section 408 to provide a contributed funds authority
 - ▶ Applies to any non-federal public or private entity
- (revised) Section 214, WRDA 2000 as amended
 - ▶ Limited to public entities, public utility companies, natural gas companies, and railroad carriers
 - ▶ Requires public notice and annual Congressional reporting
- 23 USC Section 139j
 - ▶ Limited to state DOTs
 - ▶ Approval by Federal Highways or Federal Transit



USACE Program Governance

- Section 408 Coordinator at all levels
 - ▶ (new) Specifies a Division Section 408 Coordinator
- (new) Annual audit to review decisions, consistency, and policy compliance
- (new) Section 408 tracking database with a subset of publically available fields related to status
- Coordination
 - ▶ (new) Lead District
 - ▶ (revised) Vertical Reporting



SWD and District 408 POCs

- SWD- Paul Komoroske (levees) and Mike Southern (Dams and Navigation)
- SWG- Karl Brown (interim)
- SWL- Julia Smethurst
- SWT- Bryan Taylor
- SWF- Jason Story



HQ 408 SMEs

- Tammy Conforti – Overall Policy and Levees*
- Lauren Diaz – NEPA, Categorical Permissions, Overall Process
- Amy Klein/Sarah Wingert – Regulatory
- Jeremy Crossland - Operations
- John Cline – Real Estate
- Max Wilson/Mayely Boyce – Counsel
- Deanna Sarro – Database
- Ben Caldwell – Funding

*Intent is to hire a fulltime Section 408 Lead at HQ.

