



**US Army Corps
of Engineers®**

DIRECTOR'S POLICY MEMORANDUM

CIVIL WORKS PROGRAMS

No. DPM CW 2018-01 Issuing Office: CECW Issued: 12 Jan 18 Expires: See Para. 2

SUBJECT: Section 408 – Interim Changes for Immediate Implementation and Future Policy Revisions

CATEGORY: Directive and Policy / For Information

1. References.

- a. Engineer Circular 1165-2-216, Policy and Procedural Guidance for Processing Requests to Alter U.S. Army Corps of Engineers Civil Works Projects Pursuant to 33 USC 408, 30 September 2015
- b. Memorandum, Interim Guidance on Section 408 Decision Level, 10 November 2016
- c. Memorandum, Interim Guidance on Applicability of EC 1165-2-216 within Navigable Waters, 16 June 2017
- d. Memorandum, Implementation Guidance for Section 1156(a)(2) of the Water Resources Development Act of 2016 (WRDA 2016), Contributed Funds, 27 June 2017
- e. Memorandum, Delegation Authority for District Commanders for Section 408, 25 August 2017
- f. Memorandum, Extension of EC 1165-2-216, Policy and Procedural Guidance for Processing Requests to Alter US Army Corps of Engineers Civil Works Projects Pursuant to 33 U.S.C. 408, 07 November 2017

2. **Purpose.** The purpose of this memorandum is to immediately implement policy changes in the US Army Corps of Engineers (USACE) process for reviewing Section 408 requests; provide information related to additional intended future policy changes; and, describe expectations for the vetting process of the new policy document. This memorandum is to be implemented in conjunction with references 1.a.-1.f. until issuance of a new Engineer Circular (EC) for Section 408, which is anticipated to occur by summer 2018.

3. **Applicability.** This memorandum is applicable to all headquarters USACE elements, divisions, districts, laboratories, and field operating activities related to USACE Civil Works projects.

4. **Background.** Section 14 of the Rivers and Harbors Act of 1899, as amended, and codified in 33 USC 408 (Section 408) provides that the Secretary of the Army may, upon the recommendation of the Chief of Engineers, grant permission to other entities for the permanent or temporary alteration or use of any USACE Civil Works project. This requires a determination by the Secretary that the requested alteration is not injurious to the public interest and will not impair the usefulness of the USACE project. In response to requests for substantial alterations,

USACE issued its first guidance related to Section 408 in October 2006 as a memorandum. Since then, four subsequent policy memoranda were then issued between November 2008 and June 2010, mainly to address specific issues that arose as the diversity and complexity of alterations under the Section 408 authority began to increase. On July 31, 2014, USACE published its first comprehensive policy document, reference 1.a., for Section 408 that consolidated the individual policies to improve consistency in applying and documenting Section 408 decisions. This transition from an informal process to a formalized and consistent process has led to heightened attention to the Section 408 process, particularly in the last 3 years. USACE issued interim guidance, reference 1.b. to 1.e., to implement changes to clarify and streamline the Section 408 review process.

5. Section 408 Policy Changes Effective Immediately. Until the new Section 408 EC is issued, policies reflected in references 1.a. to 1.f. will continue to remain effective, and the changes below will be implemented immediately.

a. Maintenance and repair activities conducted by non-federal sponsors on the USACE project for which they have operation and maintenance responsibilities do not require Section 408 permission but may require concurrence from the USACE district as further specified below.

(1) Operation and maintenance (O&M) activities specified in the O&M manual do not require Section 408 permission nor USACE district concurrence unless specified by the USACE district.

(2) Repairs to restore the USACE project to the physical dimensions and design of the constructed project, without any changes to the required real estate interest, existing design features, or physical dimensions or performance of the project do not require Section 408 permission, but do require USACE district concurrence.

b. A written statement from the non-federal sponsor endorsing the proposed alteration specified in paragraph 7.c.(2)(b)v. of reference 1.a. is no longer required as part of a request for a Section 408 permission. In its place, for USACE projects with a non-federal sponsor, a written “Statement of No Objection” from the non-federal sponsor is required, if the requester is not the non-federal sponsor. Non-federal sponsors typically have operation and maintenance responsibilities; have a cost-share investment in the USACE project; and/or hold the real estate interest for the USACE project. The purpose of the Statement of No Objection is to document that the non-federal sponsor is aware of the scope of the Section 408 request and does not object to the request being submitted for review. Non-federal sponsors will be provided additional opportunities to provide input for consideration by USACE during the review process and prior to a final Section 408 decision. The USACE district office may assist a third party requester in coordinating with, and obtaining the Statement of No Objection from the non-federal sponsor. If a Statement of No Objection cannot be obtained, the district will not proceed with the Section 408 review, unless at least one of the following exceptions apply:

(1) A Statement of No Objection is not required if the requester is the non-federal sponsor.

(2) A Statement of No Objection is not required when USACE has operation and/or maintenance responsibilities for all or part of the USACE project.

(3) If a USACE project has multiple non-federal sponsors and potential impacts of the proposed alteration are limited to the location of the alteration, Statements of No Objection are required only from the non-federal sponsors associated with the locations with potential impacts. However, if the proposed alteration may impact the usefulness of the USACE project as a whole, Statements of No Objection must be obtained from all non-federal sponsors.

(4) A Statement of No Objection is not required if the third-party requester could obtain the real estate interests necessary to undertake the alteration through eminent domain without the consent of the non-federal sponsor and the alteration will not be integral to the functioning of the USACE project. An alteration would be considered integral to the USACE project if the alteration must be complete, functional, and in-place in order for the USACE project to function and meet its authorized purpose. In such cases, if the third-party requester makes reasonable efforts, but is unable to obtain a Statement of No Objection from the non-federal sponsor, the requester may submit a Section 408 request with a certification or other official documentation verifying that the requester will have sufficient authority to condemn all real property interests required for the alteration in the event it is approved by USACE in lieu of a Statement of No Objection. For these cases, USACE will seek input from the non-federal sponsor on the potential impacts of the proposed alteration relative to the non-federal sponsor's responsibilities, and will take that input into consideration in making the Section 408 decision. Within 30 days of notification by USACE, the non-federal sponsor must provide its input or may propose a timeline for providing feedback commensurate with the complexity of the proposed alteration. If the non-federal sponsor provides no response within 30 days of USACE's notification, USACE may proceed with the review of the alteration request without such input. The requester's Section 408 package is not considered complete until the non-federal sponsor's input is received or until 30 days passes with no response from the non-federal sponsor.

(5) A Statement of No Objection is not required if, after a good faith effort, neither the third-party requester nor USACE can locate the non-federal sponsor or the non-federal sponsor's successor. If a third-party requester is able to secure the necessary property interest to execute the alteration but cannot identify the non-federal sponsor or successor, the requester should document the measures taken to locate the non-federal sponsor or successor and request that USACE determine if there is a viable non-federal sponsor or successor. USACE should document their efforts and decision for the administrative record and notify the requester.

c. The minimum level of detail requirement of 60% complete plans and specifications, specified in paragraph 7.c.(3)(a) in reference 1.a. is hereby removed. Districts will use best professional judgment to determine the appropriate level of detail in order to make a Section 408 decision on a case specific basis. This does not negate the need to submit plans and specifications to a certain level of design prior to initiation of construction, if determined necessary by the district.

6. Future Improvements. The overall approach for Section 408 is intended to continue to be scalable based on the scope and scale of each Section 408 request; led and tailored by each USACE district office; and promotes early and often coordination. The following are the proposed key improvements that will be incorporated into the new draft EC for Section 408, which will have the new publication number of EC 1165-2-220.

a. **New Outline.** The new draft EC will be reorganized to better clarify roles and responsibilities for those requesting Section 408 permission, and for USACE's review and decision role. The following are the new proposed main sections of the policy document:

- (1) **Program Governance.** This section will describe how USACE will oversee, coordinate, and manage Section 408 reviews.
- (2) **Applicability of Section 408.** This section will describe when Section 408 permission is required, when Section 408 permission is not required, and when the requirements of Section 408 may be met by another USACE process and/or authority.
- (3) **Options for Obtaining a Section 408 Permission.** This section will describe the three options for seeking Section 408 permission: 1) Categorical permission, 2) Multi-phased reviews, 3) Single-phased reviews.
- (4) **Basic Requirements for a Complete Section 408 Request.** This section will summarize basic information requirements that are required to be submitted for all Section 408 requests.
- (5) **USACE Review Requirements.** This section will describe actions to be taken by USACE including review plan requirements, decision objectives, and public notice requirements.
- (6) **USACE Review and Notification Timelines.** This section will contain timelines in which the requester is to be notified by USACE in writing whether their request is complete, and the expected schedule for USACE to reach a final decision. This section will reflect timelines identified in Section 1156 of the Water Resources Development Act (WRDA) of 2016.

b. **Clarification on Applicability of Section 408.** The new draft EC will contain proposed clarifications related to the following,

- (1) more specificity on which maintenance and repair activities performed by non-federal sponsors will not require a Section 408 permission, part of which is being immediately implemented in paragraph 5.a. above and when,
- (2) the requirements of Section 408 can be met by existing Real Estate, Operations, and Regulatory procedures.

c. **Non-Federal Sponsor Feedback and Engagement.** Engagement and coordination with non-federal sponsors is further clarified in the new draft EC. The requirements specified in paragraph 5.b. above is also incorporated into the new draft EC.

d. **Creation of a Multi-Phased Review Option.** This proposed option provides a formalized process for requesters to pursue Section 408 permission in milestones or smaller phases. This option will allow for the establishment of pre-determined milestones at which the requester can submit information to the USACE district to review and identify any concerns. The intent is that information submitted for each milestone would be cumulative and result in a complete Section 408 request with the information submitted for the final milestone. This option is intended for situations in which requesters would like interim reviews and assurances and those in which design-build contracts are used.

e. **Decision Level.** It is the intent that Section 408 decisions be delegated to the lowest level possible and it is anticipated that all Section 408 decisions will be either made by the Division Commander, District Commander or the District Commanders' designees, to be further specified in the new draft EC.

f. **Notification and Review Timelines.** In accordance with Section 1156 of WRDA 2016, the new draft EC will establish procedures for providing timely responses. The district will provide a response within 30 days of receipt of the initial Section 408 request, identifying additional information needed to complete the package. The district will also respond within 30 days as additional information is provided. Once the district determines that the information provided is complete, a final Section 408 decision will be provided within 90 days or an estimated decision date will be provided. Section 408 decisions that take longer than 120 days must be reported to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives.

g. **Section 408 Tracking Database.** A database is under development and will serve as the database system of record for all future Section 408 requests. A subset of fields from this database will be made publically available to provide information on the current status of Section 408 requests received. The expectation is that the database will be ready for use at the time the new Section 408 EC is finalized.

7. Near-Term Expectations. After receipt of internal and external comments, the final EC will be finalized and issued as expeditiously as possible. The vetting process for the new draft EC is anticipated to begin at the end of January 2018. Soliciting internal and external comments will be conducted concurrently. The following further describes the expectations in more detail.

a. **Internal (USACE-only) Comment Period.** The new draft EC will be emailed out to various internal distribution lists with instructions on how to submit internal comments. The internal comment period will be 20 business days. Shortly after the new draft EC is emailed out, an internal webinar will be conducted to further articulate the key changes. While reviewing the new draft EC, consideration should be given to the changes as outlined in this memorandum to ensure that the intent is articulated clearly and the processes are implementable in the new draft EC.

b. **External Comment Period.** Immediately following the initiation of the internal comment period, a notice of availability of the new draft EC will be published in the Federal Register and

emailed to various organizations and interested members of Congressional committees. At that time the new draft EC will be posted on the USACE Section 408 webpage (<http://www.usace.army.mil/Missions/Civil-Works/Section408/>) with instructions on how to submit comments. In addition, two external webinars will be conducted to further explain the content of the draft new EC and the comment submission process. Another webinar will be conducted with the USACE Tribal liaisons, whom will then ensure broad dissemination with the Tribes. It is expected that USACE staff will also broadly disseminate the Federal Register notice to appropriate external stakeholders. It is anticipated that the external comment period will be 30 calendar days.

8. Proponent. The proponent for this memorandum is Ms. Tammy L. Conforti at 202-761-4649. The following email address, HQ-Section408@usace.army.mil, can also be provided to external entities for any inquiries or submission of comments on the new draft EC.



James C. Dalton, P.E.
Director of Civil Works