



Corps Issues Draft Guidance on Section 408 Permission Requests, Solicits Comments

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On January 23, 2018, the United States Army Corps of Engineers (Corps) issued Draft Engineering Circular (EC) 1165-2-220, *Policy and Procedural Guidance for Processing Requests to Alter U.S. Army Corps of Engineers Civil Works Projects Pursuant to 33 U.S.C. § 408* (Draft EC). Comments on the draft circular are due March 7th, but there are reports that the comment deadline may be extended to April 6th.

The Draft EC, once finalized, will replace existing guidance on the permission process required by Section 14 of the Rivers and Harbors Act of 1899, as amended and codified in 33 U.S.C. § 408 (Section 408). The Draft EC consolidates existing guidance on Section 408 permissions and makes numerous changes to the existing guidance, including revising the test for when a Section 408 permission will be required, announcing general terms and standards that will be applied to all Section 408 permissions, and prescribing new timeframes for the Section 408 review process. The comment period provides an opportunity for entities that need Section 408 permissions to address specific concerns with the Section 408 process and to advise the Corps on how to better streamline the Section 408 process.

Background

Section 408 requires that any proposed occupation or use of an existing Corps civil works project be authorized by the Secretary of the Army. Examples of civil works projects include levees, dams, sea walls, bulkheads, jetties, dikes, wharfs, piers, and wetland restoration projects funded by or built by the Corps. The Corps may grant such permission if it determines the alteration proposed will not be “injurious to the public interest” and “will not impair the usefulness” of the civil works project. Under Corps policy, a Section 408 permission will not be issued before decisions on Clean Water Act Section 404 permits and Rivers and Harbors Act Section 10 permits are made.

Section 408 review may be required in a wide variety of situations. For example, a Section 408 permission was required for the Dakota Access Pipeline, a crude oil pipeline, to cross 2.83 miles of federal flowage easements and approximately 0.21 miles of federally-owned property. In addition, Section 408 review may be required where the Corps’ only connection to the project is funding, such as a wetland restoration project.

Section 408 permissions have become a significant issue in recent years because they have the potential to significantly delay projects. The Corps has limited capacity to review Section 408 permission requests because such requests are not handled by the Corps’ regulatory program. In the event that a Section 408 permission is required, the Corps may not have the staff resources to review the request unless the applicant pays for such a review. Under the authority of Section 214 of the Water Resources and Development Act (WRDA) of 2000, the Corps may accept funds from non-Federal public entities to expedite the review and evaluation of a Section 408 request. Under the 2016 WRDA, funding privileges were extended to certain private entities. It should be noted that the recent Presidential “infrastructure legislative outline” that was released on January 12, 2018 along with the President’s budget would allow any non-federal entity to pay for expedited review and evaluation of a Section 408 request.

The Corps previously issued EC 1165-2-216 in 2014 on Section 408 permissions and since that time has issued a number of interim memoranda to improve the Section 408 permission process. The Draft EC, once finalized, will replace EC 1165-2-216 as well as all interim memoranda, and will be effective for two years.

Proposed Changes to Section 408 Permission Process

Key changes proposed under the Draft EC include the following:

Program Governance Changes. The Draft EC updates the Section 408 program governance. It commits the Corps to conduct an internal audit of its decisions to examine whether Section 408 is being implemented consistently. It provides for the creation of a database, which will be partially available to the public, as a tool for requestors to be informed about the status of their requests.

Section 408 Applicability Changes. The Draft EC clarifies the geographical limitations on the applicability of the Section 408 permission process. The Section 408 process applies to the lands and real property interests identified and acquired for a Corps project. The Draft EC clarifies that, within navigable waters, the Section 408 process applies to alterations proposed to submerged lands and waters occupied or used by a Corps project. The Draft EC process *may* be applied to alterations proposed in the vicinity of a Corps project that occur on or in submerged lands and waters that are subject to the navigation servitude.

The Draft EC clarifies how emergency situations should be addressed under Section 408. Emergency alterations performed on a Corps project pursuant to Public Law (PL) 84-99 do not require a Section 408 permission, but urgent alterations that do not fit within the definition of emergency under PL 84-99 may require a Section 408 permission. PL 84-99 authorizes the Corps to undertake activities, including disaster preparedness, “advance measures” to prevent or reduce flood damage from imminent threat of unusual flooding, emergency operations, rehabilitation of flood control works threatened or destroyed by flood, protection or repair of federally authorized shore protective works threatened or damaged by coastal storm, and provisions of emergency water due to drought or contaminated source. The Draft EC indicates that when an alteration cannot be performed pursuant to PL 84-99, Corps districts can reprioritize and expedite reviews as appropriate given the urgency required for each specific situation.

The Draft EC identifies certain activities that will not require a Section 408 permission. As under the existing guidance, non-federal sponsor activities that are included in an operation and maintenance (O&M) manual for the project do not require Section 408 permission. The Draft EC also provides that a Section 408 permission is not required if a non-federal sponsor is performing activities on a Corps project that restores such project to the physical dimensions and design of the constructed project. Although a Section 408 permission will not be required, the project sponsor may still need to coordinate with the Corps. In addition, under the Draft EC, a Section 408 permission is not required for geotechnical explorations that comply with the Corps’ drilling requirements.

The Draft EC recognizes that the requirements of Section 408 may be fulfilled by another process. For example, where a project requires a real estate outgrant—an authorization of the use of real property managed by the Corps—or a Rivers and Harbors Act of 1899 Section 10 permit that covers the same scope and jurisdiction as a Section 408 permission, a separate Section 408 permission is not required. What is not addressed in the Draft EC is whether a Section 408 permission will be required to conduct O&M on a non-Corps project for which a Section 10 was previously issued.

Procedural Changes. The Draft EC identifies new procedures for seeking a Section 408 permission. Under the existing guidance, there are two options for review under Section 408—a single-phase review and a categorical review. In a single-phase review, all information for a Section 408 permission is submitted at the same time. In a categorical review, the Corps performs an analysis of impacts and environmental compliance in advance for a common category of activities. When a Section 408 permission request meets the criteria of the categorical permission, the Section 408 permission may be granted under a simplified validation process. To add flexibility, particularly for projects that involve multiple stages of engineering or construction, the new guidance allows for a multi-phased review. The Draft EC also removes the requirement that plans and specifications be, at a minimum, 60% complete to initiate the Section 408 review process.

The Draft EC incorporates new timelines for a Section 408 review that are provided in the 2016 WRDA. When a Corps district receives a Section 408 request, the district must respond within 30 days, informing the requestor that the submission was complete or specifying what additional information is required. The Draft EC does not speak to the Corps’ failure to respond within 30 days. If a completeness determination is made, the Corps district has 90 days to render a decision. If the district cannot meet the

90 day timeline, it can provide an estimated date of a final decision. If that estimate extends beyond 120 days, the Corps must provide congressional reporting.

[Click here](#) for a side-by-side chart comparing the Draft EC to the legislative provision on Section 408 developed by our firm's Corps Reform Working Group and the legislative provisions on Section 408 that are contained in the President's "infrastructure legislative outline".

For more information

Van Ness Feldman's [environment](#) and [government relations](#) teams have experience representing clients on a wide range of federal government regulations and policies affecting infrastructure and civil works projects under the Corps' jurisdiction. For more information about Section 408 and how it might affect your business, please contact [Jenna Mandell-Rice](#), [Brent Carson](#), [John Clements](#), [Herman Gesser, III](#) or [Bob Szabo](#) in Washington, DC at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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