



Final Corps Guidance Issued on Section 408 Permitting

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On September 10, 2018, the United States Army Corps of Engineers (“Corps”) issued 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* (the “Final EC”). The Final EC replaces 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 Final EC finalizes numerous changes to the Section 408 permission process initially proposed in a [draft EC issued in January 2018](#) (“Draft EC”) and creates new options and efficiencies in the process that may serve to streamline 408 permission review for certain projects. The Final EC will remain in effect until September 30, 2020.

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.

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 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. The Corps may not have staff resources to timely review a Section 408 request, but 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 also extended to certain private entities.

The Corps issued a Draft EC in January 2018, to replace previously issued EC 1165-2-216 and other interim memoranda to improve the Section 408 permission process. The Final EC adopts changes proposed in the Draft EC and revises parts of the Draft EC to clarify issues identified during the public comment process.

Changes to the Section 408 Permission Process

Key changes to the 408 permission process adopted under the Final EC include:

Program Governance Changes.

The Final EC adopted changes to the Section 408 program governance that were proposed in the Draft EC. It commits the Corps to conducting 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. The Final EC, like the Draft EC, also recognizes that public and private entities may fund Section 408 review.

The Final EC also provides clarification related to program governance that was not included in the Draft EC. The Final EC requires coordination between the Section 408 permission process and other Corps

regulatory review processes (such as Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972), indicating that one document should be developed that covers both decisions.

The Final EC emphasizes when and how tribes should be engaged during a Section 408 permission process. The Final EC acknowledges the Corps' obligation for government-to-government consultation, and indicates that notification and subsequent tribal government-to-government consultation should occur at the earliest stages and should be pre-decisional with interested federally recognized tribes.

In the Final EC, the Corps clarified when non-federal sponsor feedback must be obtained and the purposes of that feedback. Like the Draft EC, the Final EC modifies the existing requirement to obtain a written concurrence from a non-federal sponsor. Under the Final EC, a project proponent must generally obtain a statement of no objection, instead of a written concurrence, from non-federal sponsors. In addition, the Final EC clarifies that the EC does not supersede existing agreements and/or coordination procedures among Corps districts and non-federal sponsors, and that non-federal sponsors should also receive submittals of as-built drawings.

Section 408 Applicability Changes.

The Final EC adopts changes proposed in the Draft EC to the applicability of the Section 408 permission process. The Final EC clarifies the geographical scope of the Section 408 permission process. Under the Final EC, the Section 408 process applies to the lands and real property interests identified and acquired for a Corps project, to alterations proposed to submerged lands and waters occupied or used by a Corps project, and to alterations that cross over or under a federal navigation channel when the alteration is also subject to either Section 9 or 10 of the Rivers and Harbors Act of 1899. The Final EC 408 permission 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.

Like the Draft EC, the Final EC explains that 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 provision of emergency water due to drought or contaminated source. The Final 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 Final EC identifies certain activities that will not require a Section 408 permission. Non-federal sponsor activities that are included in an operation and maintenance (O&M) manual for the project do not require Section 408 permission. Section 408 permission is not required for activities 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. The Final EC, however, clarifies that coordination is still required for such activities, and it also discusses the scope of such coordination and confirms that the Corps must verify the design or construction approach of such activities.

The Final EC, like 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 Final 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.

Like the Draft EC, the Final EC indicates that, generally, geotechnical exploration drilling by a non-federal sponsor that is needed for the purposes of its operation and maintenance responsibilities does

not require Section 408 permission. The Final EC, however, changes requirements proposed in the Draft EC for other types of geotechnical exploration that do require a Section 408 permission. The Draft EC indicated that if exploratory drilling is needed before a final decision on a Section 408 can be determined, the exploratory drilling activity should be processed as its own Section 408 request or be its own milestone under the multi-phased review approach (discussed below). The Final EC removes this requirement.

Procedural Changes.

The Final EC adopts new procedural options for seeking a Section 408 permission. Under the previous guidance, there were 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 was submitted at the same time. In a categorical review, the Corps performed an analysis of impacts and environmental compliance in advance for a common category of activities. When a Section 408 permission request met the criteria of the categorical permission, the Section 408 permission could be granted under a simplified validation process.

To add flexibility, particularly for projects that involve multiple stages of engineering or construction, the Final EC allows for a multi-phased review. The Final EC clarifies that multi-phase review does not allow the review to be “piecemealed.” Instead, the requestor must submit information at each design milestone and information for each milestone will be cumulative and result in a complete Section 408 request with the information submitted for the final milestone. The Final EC also removes the requirement that plans and specifications be, at a minimum, 60% complete to initiate the Section 408 review process.

The Final EC, like 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 Final EC provides additional clarification regarding what a submittal needs to contain to be complete for categorical permission requests, single-phase review requests, and multi-phase review requests. The Final EC does not specify what the consequences would be if the Corps fails 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 report this to Congress. The Final EC provides additional clarification regarding how those timelines will apply to different types of review, including single phase, multi-phase and categorical permission reviews. For example, for requests using the multi-phase review approach, a completeness determination will be done on each milestone submittal.

The Final EC includes language suggesting that the comment period associated with the public notice on the Section 408 permission should generally be no more than 30 calendar days, but retains flexibility in setting the length of the comment period to allow the comment period to satisfy multiple requirements or to facilitate a joint public notice with another federal agency.

For more information

Van Ness Feldman assists clients with in-water and near-water project development, operation and maintenance. For consultation on these issues, contact [Brent Carson](#), [Joseph Nelson](#), [Duncan Green](#), or [Jenna Mandell-Rice](#).

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