

NEW DRAFT SECTION 408 POLICY DOCUMENT *PUBLIC COMMENT AND REVIEW*

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US Army Corps
of Engineers®



PURPOSE OF WEBINAR



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1. Provide background information and an overview of the new draft Section 408 policy document, including key changes.
2. To provide direction for submitting comments.

Note:

- Everyone will be on global mute.
- If there are sound issues, please use the chat feature to alert us.
- No questions will be taken during the webinar.
- Submit questions after the webinar to HQ-Section408@usace.army.mil
- Slides will be posted on <http://www.usace.army.mil/Missions/Civil-Works/Section408/>



TOPICS

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- Section 408 Background
- USACE Approach to Section 408 Process
- New Policy Document Overview
- Directions for Submitting Comments





SECTION 408 BACKGROUND



BACKGROUND



- Section 14, Rivers and Harbors Act 1899
- 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
- Current USACE policy for granting permission is EC 1165-2-216, plus interim guidance



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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



EXAMPLES OF SECTION 408 ACTIVITIES

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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



EVOLVING PROCESS



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- 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
- 2016 – first year direct appropriations received and formal tracking begins (1200-1500 requests per fiscal year)
- WRRDA 2014 and WRDA 2016 included related legislative requirements



USACE APPROACH TO THE SECTION 408 PROCESS



BENEFITS OF SECTION 408



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- Provides others a mechanism to alter/improve an existing project without reauthorization by Congress
- Ensures Civil Works projects continue to deliver the public benefits intended
- Allows for ensuring compatibility of new infrastructure with existing federal projects
- Ensures alterations do not have unintended negative impacts to the public



APPROACH TO REVISED POLICY



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- Considered all feedback from the internal survey
- Collected and consolidated external feedback provided
- Identified and prioritized issues and gaps
- Addressed the high priority issues in the policy and identified areas better addressed by training



PROCESS OBJECTIVES



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- Balance efficiency with well-documented and defensible decisions
- Have the general process be consistent, but information requirements be scalable
- Be led by the USACE district office
- Leverage existing information and eliminate duplication of effort
- Continue to adapt, learn, and improve



DRAFT POLICY DOCUMENT



ENGINEER CIRCULAR (EC)



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- **New** publication number: EC 1165-2-220
- EC 1165-2-220 will supersede EC 1165-2-216 and interim guidance
- Will be 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



NEW BASIC OUTLINE



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1. USACE Program Governance
2. Applicability of Section 408
3. Options for Seeking Section 408 Permission
4. Basic Requirements
5. USACE Review Requirements
6. Review and Notification Timelines
7. Decision Authority



PROGRAM GOVERNANCE

*Defines how USACE will oversee, coordinate,
and manage Section 408 reviews.*



USACE PROGRAM GOVERNANCE



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- 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



FUNDING AGREEMENTS TO EXPEDITE



- **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



APPLICABILITY OF SECTION 408

When Section 408 permission is required, when Section 408 permission is not required, and when the requirements of Section 408 are met by another USACE process and/or authority.



APPLICABILITY OF SECTION 408



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- In general, Section 408 applies to,
 - Authorized USACE Civil Works projects and
 - Actions that build upon, alter, improve, move, occupy, or otherwise could affect the USACE project (permanent or temporary)
- Geographical Limitations
 - USACE project real estate interest;
 - **Revised:** For navigable waters: USACE project boundaries; and the vicinity of the USACE project only when there is an effect to the project;



APPLICABILITY OF EC



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- **New:** Emergency alterations – if not under PL84-99, follow EC (check other exceptions), reprioritize, use existing emergency environmental processes
- **Revised:** Project sponsor activities do not require Section 408 permission (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)



APPLICABILITY OF EC



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- Requirements of Section 408 is met by another USACE process and/or authority (no separate Section 408 decision required)
 - **Revised:** USACE Real Estate Outgrant
 - **New:** Section 10 Regulatory Permit, in Navigation appendix
- **Revised:** Non-federal Construction of a USACE project (Section 204) and Crediting



OPTIONS FOR SEEKING SECTION 408 PERMISSION

*Describes potential ways for requesters
to seek Section 408 permission.*



OPTIONS FOR SEEKING 408



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1. **Revised** with **new** appendix: Categorical Permission – streamline process for “categories” of alterations that are similar in nature
2. Single-Phased Review – all required information submitted at one time
3. **New:** Multi-phased Review
 - Formalized process to pursue Section 408 permission in milestones or smaller phases
 - Interim reviews and assurances at pre-determined milestones



SCENARIOS FOR MULTI-PHASED REVIEW



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- 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



BASIC REQUIREMENTS (INFORMATION TO BE PROVIDED BY REQUESTERS)

Describes basic information that is required in order to have a “complete Section 408 request.”



BASIC REQUIREMENTS



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- **Revised:** 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
 - Specific quality and technical reviews may be required
 - **Revised:** 60% design no longer a minimum (district determines appropriate level case by case)



BASIC REQUIREMENTS, CONT.



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- Environmental Compliance (**new appendix**)
 - NEPA document (documentation of Categorical Exclusion, EA, or FEIS) must be drafted for the Section 408 request to be “complete”
- Real Estate
- Update of O&M requirements
- **New:** Once all of the basic requirements have been satisfied, the Section 408 request is considered “complete” and the 90-day timeline for review and decision making is triggered.



USACE REVIEW REQUIREMENTS

Describes actions to be taken by USACE including review plan requirements, decision objectives, and public notice requirements.



STANDARDS FOR USACE REVIEW

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- **Revised:** 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
 - **Revised:** 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
 - **Revised:** May be integrated with the NEPA decision document (FONSI or ROD) for efficiency
- **New:** Standard terms and conditions



REVIEW AND NOTIFICATION TIMELINES

Reflect timelines and notification requirements identified in Section 1156 of the Water Resources Development Act (WRDA) of 2016.



NEW TIMELINES



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- Emphasize intent of timely reviews 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 (applies to all three options)
- 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



DECISION AUTHORITY



REVISED DECISION LEVEL



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- All Section 408 decisions are delegated to Divisions and Districts
- Division Commanders the decision-maker for the following,
 - 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
- Majority of Section 408 requests decided at the district (District Commanders can delegate decisions to a district division chief)



PUBLIC COMMENT PROCESS



COMMENT SUBMITTAL



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- Comments can be submitted through the Federal Register notice, <https://www.federalregister.gov>
 - Docket number COE-2018-0003
 - Comment Portal: <http://www.regulations.gov>
- Email: HQ-Section408@usace.army.mil, subject “EC 1165-2-220 Comments” or “Docket number COE-2018-0003”
- Mail (no hand delivery or courier):
 - Headquarters, U.S. Army Corps of Engineers, ATTN: CECW-CE/3E62, 441 G Street NW., Washington, DC 20314-1000.



COMMENT SUBMITTAL



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- Comment will be 30 days.
- All unique comments will be made publicly available on [regulations.gov](https://www.regulations.gov).
- Questions about submitting comments can be directed to HQ-Section408@usace.army.mil.
- Information can also be found at <http://www.usace.army.mil/Missions/Civil-Works/Section408/>