

CECW-ZB

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No. 1165-2-220

10 September 2018

EXPIRES 30 SEPTEMBER 2020
Water Resource Policies and Authorities
POLICY AND PROCEDURAL GUIDANCE FOR PROCESSING REQUESTS
TO ALTER US ARMY CORPS OF ENGINEERS CIVIL WORKS PROJECTS
PURSUANT TO 33 USC 408

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DEPARTMENT OF THE ARMY
US Army Corps of Engineers
Washington, DC 20314-1000

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1. Purpose. The purpose of this Engineer Circular (EC) is to provide policy and procedural guidance for processing requests by private, public, tribal, or other federal entities to make alterations to, or temporarily or permanently occupy or use, any US Army Corps of Engineers (USACE) federally authorized Civil Works project under 33 USC 408 (Section 408). Proposed alterations must not be injurious to the public interest or impair the usefulness of the USACE project.

a. This EC contains guidance applicable to all types of USACE projects that can be tailored to the appropriate level of detail for a specific Section 408 request. Supplemental guidance for specific infrastructure types (i.e., dams, hydropower, levee systems, and navigation) and other procedures can be found in the appendices.

b. This EC will serve as the most current comprehensive guidance for Section 408 reviews until it is supplemented, replaced, or expires. This EC applies to requests for alterations received by districts on or after the date of issuance. All requests submitted prior to the effective date of this EC can be processed consistent with the previous policy or this EC, at the requester's discretion.

c. This EC contains guidance related to interaction between USACE Section 408 decisions and other USACE processes, such as real estate decisions and permits under the USACE Regulatory Program.

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

3. Distribution Statement. Approved for public release; distribution is unlimited.

4. References. References for the main EC are in Appendix A. Other references are specified in specific appendices as appropriate.

5. Authority. See Appendix B.

6. Basic Definitions. For the purposes of this EC, the following terms are used:

a. “District” refers to a USACE district office and “division” refers to a USACE division office.

b. “USACE project” refers to a USACE federally authorized Civil Works project, including those operated and/or maintained by USACE and those operated and maintained by a non-federal sponsor.

c. “Alteration” refers to any action by any entity other than USACE that builds upon, alters, improves, moves, obstructs, or occupies an existing USACE project. Unless otherwise stated, for ease of reference, the use of the term “alteration” in this document also includes “occupation” and “use.”

d. “Requester” refers to an entity other than USACE that is requesting permission to alter a USACE project. A request for Section 408 permission can originate from a non-federal sponsor (see definition in next paragraph) or an independent requester.

e. “Non-federal sponsor” refers to a non-federal interest, as defined in the Flood Control Act of 1970, as amended (42 USC 1962d-5b(b)), that has provided assurances or executed a binding agreement for the provision of items of local cooperation for a USACE project, including, as applicable, operation and maintenance.

f. “Regulatory Program” or “Regulatory” is the USACE program responsible for oversight and implementation of permits under 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 (Section 10/404/103).

g. “Shoreline use permit” refers to the written permission issued by USACE under Part 327 of Title 36 of the Code of Federal Regulations to authorize certain structures, facilities, and uses in or adjacent to waters that are managed by USACE at Civil Works projects.

h. “Outgrant” refers to a real estate instrument which conveys or grants the right to use real property and is usually in the form of a lease, license, or easement. A consent is not an outgrant.

i. “Consent” refers to a written agreement between the holder of an easement and the owner of the underlying fee estate, that allows the owner of the underlying fee estate to use (or authorize another to use) their land in a manner that the easement holder has determined will not interfere with the easement holder’s rights. A consent does not grant an interest in real estate and is not an outgrant.

j. “Real property” refers to any interest in land, including leaseholds, easements, and rights-of-way, together with the improvements, structures, and fixtures located thereon.

k. “Real property of the United States” refers to real property owned by the United States that is under the administrative jurisdiction of USACE.

7. Program Governance. USACE will maintain a three-level decentralized organization to implement this EC, comprising Headquarters USACE (HQUSACE), division, and district levels. The Commanders at each level – HQUSACE, division, and district – have ultimate responsibility for ensuring that Section 408 decisions comply with current policy and procedures. Each level is required to establish and maintain personnel and procedures to implement this EC.

a. Program Oversight. HQUSACE will designate a HQUSACE proponent to oversee the execution of this EC and monitor progress. Each fiscal year, HQUSACE will lead an audit. The audit will be coordinated through appropriate Division and District Commanders and will result in an audit report to be submitted to the Director of Civil Works. At a minimum, the audit report will include a review of a sampling of district and division Section 408 decisions, an assessment of the consistency of documentation of decisions and compliance with policy agency-wide, use of streamlining processes (e.g., categorical exclusions, categorical permissions, and procedural review plans), and lessons learned and corrective actions needed in order to improve the process agency-wide. The audit will also evaluate the timeliness of decisions.

b. Section 408 Coordinator. Each District and Division Commander will designate a Section 408 Coordinator with the appropriate professional expertise and experience to manage and coordinate (both internally and externally to USACE) Section 408 activities. Section 408 Coordinators must have management and communication abilities and have knowledge and experience with the Section 408 procedures. District Section 408 Coordinators will ensure proper coordination occurs among all the necessary elements internally and externally, including but not limited to regulatory, tribal liaisons, real estate, counsel, planning, engineering and construction, programs and project management, and operations. Division Section 408 Coordinators will ensure proper coordination among other districts if the USACE project or proposed alteration crosses more than one district’s area of responsibility, reference paragraph 7.h.(3), and consistency in implementation within the divisions’ areas of responsibility. In addition, Section 408 Coordinators are responsible for data management in the Section 408 database, reference paragraph 7.d, and appropriate webpages, reference paragraph 7.e, to ensure information and status of Section 408 requests are current. Section 408 Coordinators will ensure budgetary information and resource needs to accomplish USACE Section 408 activities are coordinated and submitted during the budgeting process.

c. Administrative Record. The district will be responsible for maintaining an administrative record for each Section 408 request in their area of responsibility. The administrative record should include all documents and materials directly or indirectly considered by the decision-maker. It should include documents, materials, and a record of the offices and staff that are pertinent to the merits of the decision, as well as those that are relevant to the decision-making process. Record documents will be uploaded to the Section 408 database, reference paragraph

7.d, as appropriate.

d. Section 408 Database. HQUSACE will establish and maintain a Section 408 database to serve as the database system of record for all Section 408 requests. The database system will be created in a manner to ensure information can be shared and synchronized with other USACE database systems as appropriate. The database will adhere to standards established for the Civil Works Business Intelligence (CWBI) and be managed under the CWBI Automated Information System, which is part of the Civil Works information technology portfolio. Database entry and quality control/quality assurance of entered data is the responsibility of districts and divisions. A subset of fields from this database will be made publicly available to provide information on the current status of Section 408 requests received.

e. Public Webpages. HQUSACE will establish and maintain a publicly available Section 408 webpage to provide basic information on Section 408, and viewable access to a subset of the Section 408 database fields related to status of requests. Each USACE district, and division if necessary, will ensure information on how a requester can submit a Section 408 request to the district is available on district-specific public webpages. District webpages will include contact information and a link to the HQUSACE Section 408 public webpage and database.

f. Funding for USACE Section 408 Responsibilities. USACE-led Section 408 activities that require funding include those on a programmatic level (e.g., data management, program management, coordination, generating categorical permissions, developing procedural review plans, and creating funding agreements) and those activities related to processing Section 408 requests (e.g., reviewing requests, development of environmental and cultural resource final documents, construction oversight, approving updates to Operation and Maintenance manuals related to the alteration, and alteration-specific review plans).

(1) See guidance on funding for Section 408 in the current Civil Works Program Development Guidance.

(2) Districts will ensure requesters are aware of the opportunity to use funding agreements to expedite activities related to processing Section 408 requests, see paragraph 7.g.

(3) Enforcement activities, reference paragraph 18, associated with completed and in-place Section 408 alterations or unapproved encroachments, will be funded from the appropriate source associated with the inspection and oversight procedures for that specific USACE project.

(4) Regulatory Program funds can only be used for a Section 10/404/103 action, which may include those actions with an associated Section 408 request. Regulatory staff can use Regulatory funds to participate in joint meetings and internally coordinate portions of shared documents when a Section 408 request also requires a Section 10/404/103 action.

g. Funding Agreements. The following are the three main authorities through which

USACE may accept and expend funds to expedite the review and evaluation of a Section 408 request. Districts should choose the funding agreement option that is most appropriate to provide the most efficiency. See Appendix I for detailed procedures.

(1) Section 1156(a)(2) of the Water Resources Development Act (WRDA) 2016 amended Section 14 of the Rivers and Harbors Act of 1899 (33 USC 408) to authorize the acceptance and expenditure of funds received from non-federal public or private entities to evaluate requests under Section 408. This authority is the most flexible and streamlined authority for accepting funding for Section 408 reviews.

(2) Funds may be accepted under the authority of Section 214 of WRDA 2000, as amended, (33 USC 2352) to expedite the review and evaluation of a Section 408 request for a public purpose. Funds may be accepted from non-federal public entities; public utility companies; natural gas companies; or railroad carriers. This authority requires a public notice before receipt of funds and has other limitations.

(3) Funds may be accepted under the authority of 23 USC 139(j) to expedite the review and evaluation of a Section 408 request associated with a federal-aid transportation project. Funds may be accepted from certain public entities that receive financial assistance from the U.S. Department of Transportation (USDOT). This authority requires USDOT approval of the agreement and has other restrictions and requirements. This authority may be more appropriate for projects for which the Federal Highway Administration (FHWA) and/or Federal Transit Administration (FTA) are the lead agency and the transportation project sponsor is seeking or receiving financial assistance from USDOT for permitting.

(4) To accept funds from another federal agency, a specific statutory authority must be identified that authorizes the transfer of funds for such a purpose.

h. Coordination.

(1) Effective communication and coordination, both internally and externally, is critical to achieve efficient decision-making on Section 408 requests. Districts will ensure that internal and external coordination is conducted as necessary to ensure timely and efficient reviews and decision-making. In addition, districts will seek opportunities to integrate or align internal procedures, leverage information between processes, and eliminate redundancy, while ensuring appropriate laws and policies are being met. Early and frequent coordination between USACE, the requester, and/or non-federal sponsor, if applicable, is strongly recommended. Coordination, notification and subsequent tribal government-to-government consultation should occur at the earliest stages and should be pre-decisional with interested federally recognized tribes, including tribes whose aboriginal territories extend into the lands where the proposed activity may occur. Coordination with tribes should happen prior to or concurrent with coordination with State Historic Preservation Officers. The most effective way to determine whether an area has tribal cultural, historic or spiritual significance is to work with representatives from each tribal nation

that either resides or has ancestral ties to the area proposed for the Section 408 request. Coordination will aid in early identification of potential issues and help to focus efforts, thereby minimizing costs to the requester and USACE.

(2) Districts will provide a copy of this EC to non-federal sponsors of USACE projects. This EC is not intended to replace existing coordination processes districts may have with non-federal sponsors for efficient reviews of alterations to the USACE project. Districts are encouraged to adapt existing coordination processes or develop new standard operating procedures to reflect requirements in this EC and to support effective and efficient reviews.

(3) One lead district, and its' associated division office, will be designated for any single non-USACE project that crosses district or state boundaries (e.g., pipelines, highway projects, electrical transmission projects) and requires either Section 10/404/103 review(s), Section 408 review(s), or a combination of both consistent with reference A.41. The lead district will be responsible for maintaining situational awareness on the status of all Section 10/404/103 and Section 408 reviews; serving as a primary point of contact for the requester; and coordinating schedules and requirements to meet review and decision milestones.

(4) In cases in which a Section 408 permission (except for Section 408 decisions that must be made by the Division Commander, per paragraph 8.c.) and a Regulatory standard individual permit are both required for the same proposed alteration/activity, the district will conduct these evaluations in a coordinated and concurrent manner resulting in a single decision document. Although each mission area (between Section 408 and Regulatory) is responsible for the review requirements specific to its respective authorities, the environmental compliance to cover both the Section 408 permission and Regulatory permit decisions will be coordinated by a single office. Consideration should be given to the scale and scope of the activities subject to each authority when designating the lead office for environmental compliance. The district Regulatory Chief and the Section 408 Coordinator will jointly decide which office will be the lead for environmental compliance. If agreement cannot be reached, then the District Commander will decide. The single decision document will contain documentation for the final decisions for both the Section 408 permission and the Regulatory permit. Note that implementing regulations and policies for the Regulatory permit require the evaluation of proposed activities and their compatibility with the purposes of a federal project. The Section 408 analysis informs the compatibility with the purposes of a federal project for Regulatory purposes. In addition, there will be a single transmittal letter to the requester that includes as attachments both the Section 408 decision letter and the Regulatory permit. The District Commander is the deciding official for the single decision document for these cases, although he or she may further delegate these combined decisions following the same requirements as in paragraph 8.d. As a result, in these cases, the Section 408 permission and Regulatory individual permit will be reviewed and finalized at the same decision level and by the same deciding official. See Appendix G for alternative procedures related to Section 10 and Section 408.

(5) In cases in which an alteration requiring a Section 408 permission and a Regulatory

permit decision other than a standard individual permit, the district will conduct these evaluations in a coordinated and concurrent manner to the maximum extent practicable. For these cases, there will be a single transmittal letter to the requester that includes as attachments both the Section 408 decision letter and the Regulatory permit. A single decision document, single office lead for environmental compliance, or the same deciding official is not required. However, the Section 408 decision must be finalized before or concurrent with, but not after, the Regulatory decision. Implementing regulations and policies for the Regulatory decisions require the evaluation of proposed activities and their compatibility with the purposes of a federal project. The Section 408 decision informs the compatibility with the purposes of a federal project for Regulatory purposes.

(6) In cases in which a proposed Section 408 alteration may affect the formulation, evaluation, or selection of alternatives for a current Investigation or other USACE study, (for example, when approval or denial of a proposed alteration would materially affect the completeness, effectiveness, efficiency, and/or acceptability of one or more alternatives being evaluated as part of a feasibility study), district staff reviewing the Section 408 request will coordinate with the district study team to identify, track, and ensure vertical awareness of the interdependencies between the Section 408 request and the USACE study. Study and implementation risks associated with the decision (approval or denial) on the Section 408 request will be managed and discussed with the vertical team through the study milestones.

(7) In cases in which a proposed Section 408 alteration changes how the USACE project will meet its authorized purpose, district staff reviewing the Section 408 request will coordinate vertically with the division to the appropriate Regional Integration Team (RIT) and Office of Counsel to confirm that Section 408 is being appropriately applied. An example is a proposed alteration to permanently breach a levee system for ecosystem restoration purposes and raise all structures behind the levee to achieve the same flood risk management benefits. This USACE project still meets the authorized flood risk management purpose but in a different manner.

(8) A proposed alteration may also be subject to other laws or requirements that involve additional coordination, prioritization, and/or transparency (e.g., Title 41 of the Fixing America's Surface Transportation Act (FAST-41), Federal-aid highway and transit projects subject to 23 USC 139, priority projects under an existing Executive Order, etc.). Districts should be aware of, and actively participate in, any additional coordination required for the Section 408 request, including supporting development of schedules and updating any non-USACE databases (e.g., FAST-41 Coordinated Project Plans and Dashboard), if required. Districts should coordinate vertically, through the division, to the appropriate Regional Integration Team (RIT), if upward reporting on status is required for these Section 408 requests. Reporting for Section 408 should be accomplished in a concurrent and coordinated manner with any other required USACE actions for that project (e.g., pending Regulatory permit decisions or real estate decisions, etc.).

(9) Requesters seeking sensitive information about an existing USACE project to develop a proposed alteration will submit requests for that information in writing to the district. Sensitive

information includes information that could pose a security risk or aid those intending to do harm to a USACE project. Examples include, but are not limited to, design analyses, as-builts or other drawings, specifications, location of deficiencies, operational information, and contingency plans. The district office that generated or is responsible for the information requested will review the request in coordination with the district operational security officer to determine whether it is sensitive. Districts should limit the distribution of sensitive information to only the information that is necessary for the proposed alteration. Districts will advise requesters that the information to be provided is sensitive and direct requesters to provide a list of individuals with whom the information will be shared. Districts will advise requesters that the sensitive information will not be shared with individuals not on the list. Reviewers should work with their District Office of Counsel to determine if a non-disclosure statement is needed. In some cases, districts may have to withhold sensitive information regardless of its necessity for the development of a proposed alteration. Requests to USACE for other agency data will be referred to the other agency for a release determination. Information provided by federally recognized tribes during consultation may be sensitive and not publicly available. Districts must ensure sensitive information provided by federally recognized tribes is not disclosed to the extent allowable by law and that the administrative record pertaining to this sensitive information is general in nature.

(10) Vertical coordination among district, division, and HQUSACE must occur when there is any question related to the appropriate course of action; the nature of the Section 408 request is without precedent; or the review of the Section 408 request requires deviation from policy.

8. Decision Authority. All final Section 408 decisions will comply with the following:

a. All Section 408 decision-makers must ensure accountability and consistency with federal law and policy. Section 408 decision-makers must also ensure the appropriate and requisite expertise has reviewed each Section 408 request.

b. A categorical permission may be created at the district, division, or HQUSACE level, but must be approved and signed by a District Commander, Division Commander, or the Director of Civil Works, depending upon the region in which it is applicable. Validation that a Section 408 request is consistent with the terms and conditions of a categorical permission and subsequent authorization of the activity under the categorical permission may be delegated. The delegation should be established through the process used to create the categorical permission. Reference Appendix C for additional information for categorical permissions.

c. Division Review and Decision. The following are the Section 408 requests that will require a final decision by the Division Commander and cannot be further delegated. Division Commander decisions will consider the analysis and recommendation by the District Commander. For Section 408 requests that require approval by the Division Commander and uses the multi-phased review option (reference paragraph 10.c.), Division Commanders have discretion to render a decision on any or all milestones, but must render the decision for the final

milestone. Districts will keep divisions informed of the progress throughout the multi-phased review process, including any issues and concerns that would be pertinent to the Division Commander's decision for level of involvement and rendering the final decision. The Division Commander can delegate milestone decisions, except for the final milestone, to District Commanders or the District Commanders' designee.

(1) Proposed alterations that require a Safety Assurance Review (SAR), see paragraph 12.c.(4).

(2) Proposed alterations for the installation of hydropower facilities. Coordination and concurrence with the division Dam Safety Officer and the division Hydropower Coordinator is required prior to the final Section 408 decision.

(3) Proposed alterations for which the non-federal sponsor for a USACE project is seeking potential credit under Section 221 of the Flood Control Act of 1970, as amended. A decision on a Section 408 request is separate from any decision on potential credit for in-kind contributions. See paragraph 9.g.

(4) Proposed alterations that affect the formulation, evaluation, or selection of alternatives for a current study under the Investigations account or other USACE study. Coordination with the division Chief of Planning is required prior to the final Section 408 decision. See paragraph 7.h.(6).

(5) Proposed alterations that change how the USACE project will meet its authorized purpose. See paragraph 7.h.(7).

(6) Proposed navigation alterations for which federal assumption of operation and maintenance under Section 204(f) of Water Resources Development Act of 1986, as amended, is also being sought. See paragraph 9.f.(5).

d. District Review and Decision. All other decisions for Section 408 requests not included in paragraphs 8.c.(1) through 8.c.(6) may be rendered by the District Commander. A District Commander may further delegate authority for such decisions to his or her designees. The delegation must be in writing and signed by the District Commander, with the delegation identifying the name and title of the individual to whom authority is being delegated and what limitations, if any, are being imposed. District Commanders may not delegate Section 408 decisions below a supervisory Division Chief level. No further re-delegation by a designee is authorized. A copy of the delegation must be maintained in the office where the authority is held.

e. At any time, the Director of Civil Works, Division Commanders, and District Commanders have discretion to elevate decision-making authority for the final decision for a specific Section 408 request based on the unique or special circumstances involved. The

following are examples of the types of considerations for elevating a Section 408 decision level:

- (1) The nature of the Section 408 request is without precedent;
- (2) The review of the Section 408 request may require variation from regional or national policy; or,
- (3) A proposed alteration of a USACE project crosses more than one district's or division's area of responsibility.

f. The appropriate National Environmental Policy Act (NEPA) decision document (Record of Decision or Finding of No Significant Impact) will be signed by the USACE official making the decision for the corresponding Section 408 request, if it is not already integrated into the Summary of Findings document reference paragraph 15.b. Documentation of the applicability of a categorical exclusion may be signed by the Section 408 decision-maker or other appropriate district staff.

9. Determining When Procedures in this EC Apply. The following describes when the procedures in this EC apply, along with exceptions. The following does not affect the requirement for a Regulatory permit or any other applicable permits. Note, however, paragraphs 7.h.(4) and 7.h.(5) and Appendix G outline how Regulatory and Section 408 reviews must be either consolidated or effectively aligned depending on certain circumstances.

a. Geographical Limitations.

(1) This EC must be applied to alterations proposed within the real property identified and acquired for the USACE project, with exceptions further described in this section. An activity affecting a USACE project not yet constructed or under construction is considered to be an alteration, occupation, or use of a USACE project requiring permission under Section 408 if the activity will occur on real property that the Federal Government has acquired for the USACE project or that the non-federal sponsor has provided for the USACE project under the terms of a Project Partnership Agreement (PPA).

(2) This EC must be applied to alterations proposed to submerged lands occupied or used by a USACE project.

(3) This EC must be applied 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.

(4) At the USACE district office's discretion, this EC may be applied to alterations to submerged lands proposed in the vicinity of a USACE project that occur in an area subject to the navigation servitude, when it is determined that the alterations have the potential to impair the

usefulness of the USACE project. Navigation servitude is defined as the dominant right of the Government under the Commerce Clause of the U.S. Constitution (U.S. Const. art. I, sec. 8, cl. 3) to use, control, and regulate the navigable waters of the United States and the submerged lands thereunder for various commerce-related purposes, including navigation and flood control. In tidal areas, the servitude extends to all lands below the mean high water mark. In non-tidal areas, the servitude extends to all lands within the beds and banks of a navigable stream that lie below the ordinary high water mark.

(5) This EC should not be applied to proposed alterations occurring outside of the areas specified in paragraphs 9.a.(1) to 9.a.(4). If there is a case in which a proposed alteration occurring outside of the areas specified could impair the usefulness of a USACE project, such cases should be coordinated vertically through the appropriate Regional Integration Team (RIT) to determine the course of action.

b. Emergency alterations or emergency activities performed by USACE on USACE projects under Public Law (PL) 84-99, reference A.29, do not require Section 408 permission. Alterations by others that are considered an emergency and/or urgent, which may include interim risk reduction measures, but not implemented under PL 84-99, may require Section 408 permission and this EC would apply. Districts will consider if the alteration meets other criteria defined under this paragraph 9. If this EC applies, districts can reprioritize and expedite reviews as appropriate given the urgency required for each specific situation. Reference Appendix D on expediting environmental compliance in emergency situations.

c. Non-federal Sponsor Maintenance and Repair Activities. 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 coordination or concurrence from the USACE district, as further specified below.

(1) Operations and Maintenance (O&M) activities, including any floodfighting and/or other emergency activities, specified in a USACE-issued O&M manual do not require Section 408 permission.

(2) Activities to restore the USACE project to the physical dimensions and design of the constructed project, without any changes to the real property, existing design features, or physical dimensions or performance of the USACE project do not require Section 408 permission. USACE districts may at any time require the non-federal sponsor to coordinate with the district to verify the design or construction approach of such activities based on scope and scale. USACE districts should proactively coordinate with the non-federal sponsor to identify, if any, the types of activities that may need this verification.

(3) Geotechnical exploration drilling by the non-federal sponsor associated with activities described in paragraphs 9.c.(1) and (2) does not require Section 408 permission. However, drilling in embankment dams and levees must comply with requirements in reference A.31,

including a drilling plan. Districts will coordinate with non-federal sponsors to develop the drilling plan.

d. Improvements, excavations, construction, or changes to local flood protection works referenced in 33 Code of Federal Regulations (CFR) 208.10(a)(4) and (5) do not negate nor replace the requirement for approval from USACE under Section 408 as specified for such activities in this EC.

e. When a proposed alteration will be carried out entirely within the boundaries of real property of the United States or reservoirs managed by USACE, a separate evaluation under the procedures in this EC is not required, so long as the alteration is either consistent with an approved project master plan developed according to references A.34 and A.39, or subject to a Report and Determination of Availability under chapter 8 of reference A.28. In such cases, the project master planning process or the procedure for preparing the Report and Determination of Availability satisfies the requirements for Section 408 for the proposed alteration. No separate Section 408 permission is required to support issuance of the associated shoreline use permit or outgrant. Note, in these instances, Regulatory can render a permit decision before USACE issues the shoreline use permits or outgrants, as long as Regulatory has received the Determination of Availability or confirmation of consistency with the approved project master plan, whichever is applicable to the proposed alteration.

(1) When a federal agency other than USACE is responsible for issuing the permit or outgrant authorizing a proposed alteration that will be carried out within the boundaries of real property of the United States or reservoirs managed by the USACE (e.g., pipeline rights-of-way issued by the Bureau of Land Management under 30 USC 185, or hydropower licenses issued by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act), a separate Section 408 permission is not required if USACE provides the other federal agency with a Report and Determination of Availability or confirmation of consistency with the approved project master plan prior to the other federal agency's issuance of the permit or outgrant. In cases where a Report or Determination of Availability is not required by chapter 8 of reference A.28, and the proposed alteration has not been evaluated during the project master planning process, a Section 408 permission is required prior and in addition to, the permit or outgrant issued by the other federal agency. In all cases, USACE will advise the other agency of any special conditions that must be incorporated into the permit or outgrant issued by the other federal agency.

(2) If a proposed alteration requires use of both real property of the United States and real property owned by other entities or non-federal sponsors, then the processes in this EC will apply. In these cases, USACE will incorporate the decisions associated with the USACE required shoreline use permit, outgrant, or consent as part of the comprehensive Section 408 evaluation and decision.

(3) In cases in which a USACE real estate decision and Section 408 decision are both

needed, the district will conduct these evaluations in a coordinated and concurrent manner to the maximum extent practicable. Although reviews for both Section 408 and the real estate decisions can be conducted concurrently, final decision-making requires that the Section 408 decision be rendered before or concurrent with, but not after, the USACE real estate decisions. Implementing regulations and policies for the real estate decisions require the evaluation of proposed activities and their compatibility with the purposes of a federal project. The Section 408 decision informs this element of the evaluation for shoreline use permits, outgrants, and consents. The required shoreline use permit, outgrant, or consent must still be issued before the alteration can be carried out on real property of the United States.

(4) Fees for administrative processing of outgrants issued by USACE will be determined by applicable regulations and policy promulgated under the authority of 10 USC 2695 and 30 USC 185(l). Evaluation of a USACE project alteration requiring the issuance of a permit or outgrant by another federal agency will be funded using Operation and Maintenance funds provided for the USACE project or appropriate funding associated for coordination for non-federal hydropower development, if applicable. If a Section 408 permission is required refer to paragraph 7.f. for funding related to Section 408 reviews.

f. Non-Federal Construction of a Water Resources Development Project.

(1) Section 204 of WRDA 1986, as amended, authorizes non-federal interests to undertake construction of certain water resources development projects, or separable elements, with potential credit or reimbursement of the federal share of that construction, subject to several requirements, including obtaining all necessary permits. If the proposed work under Section 204 would alter an existing USACE project, then the non-federal interest must obtain Section 408 permission under this EC, unless the proposed work has been authorized for construction by Congress, or the USACE real estate policies and process applies (reference paragraph 9.e). Further guidance on Section 204 of WRDA 1986 is included in reference A.38.

(2) If a Section 408 permission is needed to implement work under Section 204, conducted consistent with a feasibility study, the procedures and process in reference A.38 will be followed in lieu of the review and decision process in this EC, and the district report that is required for approval for construction will also serve as the documentation and basis for the Section 408 permission decision. The Section 204 report will specifically address any impacts to the usefulness of the existing USACE project and the public interest.

(3) Districts should ensure that, to the maximum extent practicable, information from the feasibility study, including technical analyses, NEPA documentation, National Historic Preservation Act (NHPA) documentation, and other environmental and cultural resources compliance is used for the Section 204 report. Districts must determine whether physical or environmental circumstances have changed since the feasibility study was completed and supplement those analyses if necessary.

(4) If the Section 204 report is approved by the Assistant Secretary of the Army for Civil Works (ASA(CW)), this approval will also constitute approval of the Section 408 permission. The District Commander will document that the Section 408 permission is granted and reference the Section 204 report approval.

(5) For alterations for which the non-federal interest is seeking federal assumption of maintenance under Section 204(f) of WRDA 1986, as amended, Section 408 permission will be required unless the modification to the USACE navigation project has already been specifically authorized by Congress. In order to avoid duplication of documentation for these two authorities, districts should ensure that requirements for both are coordinated and leveraged to the maximum extent practicable. Reference A.37 for the approval process and requirements for a Section 204(f) request. In general, the Section 204(f) report will not be submitted to the ASA(CW) for approval unless and until the Section 408 permission and any Section 10/404/103 permits have been approved.

g. In-kind Contribution Credit under Section 221 of the Flood Control Act of 1970, as amended (Section 221). There may be cases in which a non-federal sponsor wishes to undertake alterations to an existing USACE project for which there is an ongoing USACE feasibility study and the non-federal sponsor seeks credit eligibility for those alterations toward its cost share for the USACE project that is not yet authorized for construction. In such cases, any proposed alteration for which the non-federal sponsor is seeking credit cannot be initiated until the draft feasibility report is released for public review, an in-kind Memorandum of Understanding (MOU) for the work is executed, and Section 408 permission is issued.

(1) In those cases where a non-federal sponsor is undertaking work as an in-kind contribution on an authorized USACE project per an executed project partnership agreement that provides credit for such work, Section 408 permission is not required.

(2) Detailed guidance on crediting can be found in reference A.36.

h. Actions conducted under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The portions of any removal or remedial action conducted entirely onsite (as that term is used in CERCLA) in a manner consistent with CERCLA and the National Contingency Plan (40 CFR Part 300) are not subject to the procedural requirements in this EC. USACE will work with the United States Environmental Protection Agency (EPA) or other federal agency undertaking or overseeing the CERCLA response during the investigation and during the process of developing the removal or remedial action to ensure that the remedy implemented does not impair the usefulness of the USACE project and is not injurious to the public interest.

10. Options for Seeking Section 408 Permission. Early coordination between USACE, the requester, and/or non-federal sponsor, if applicable, is recommended in order to determine the optimal option below. All information must be submitted in writing to USACE.

a. **Categorical Permission.** The district, division, and/or HQUSACE have the ability to create a “categorical permission” in order to expedite and streamline the review and decisions of Section 408 requests that are similar in nature and that have similar impacts to the USACE project and environment. An assessment of impacts to the usefulness of the USACE project, environmental compliance, and a public interest determination is conducted ahead of time for a common category of activities. For those individual Section 408 requests that are consistent with the terms and conditions of an established categorical permission, the Section 408 request can be granted with a simplified validation process. See Appendix C for details.

b. **Single-Phased Review.** Requesters may submit all information needed for a Section 408 request, reference paragraph 11, at one time for USACE to review and render a decision.

c. **Multi-Phased Review.** This option provides a formalized process for requesters to pursue Section 408 permission in milestones. In other words, there is a proposed alteration in which interim reviews are conducted as the level of detail of the information is progressively developed. However, the multi-phased review approach cannot be used to piecemeal the evaluation of effects of the proposed alteration. Assessing effects to the environment, public interest, and the USACE project must consider the proposed alteration as a whole. This approach will require the district, the requester, and non-federal sponsor, if applicable, to establish pre-determined milestones at which the requester will submit specified information to the district. The district will review the information at each milestone to identify any concerns. Based on the information provided at each milestone, the district will provide a written response providing feedback and a determination as to whether or not the requester can proceed to the next milestone. This approval to the next milestone means that USACE has not identified any critical items that would preclude the eventual approval of the Section 408 based on the information reviewed, but does not guarantee an approval of the final Section 408 request. Information submitted for a specific milestone is not required to meet all of the basic requirements for a complete Section 408 request; however, information for each milestone will be cumulative and result in a complete Section 408 request with the information submitted for the final milestone. The following are additional considerations for this multi-phased review approach:

(1) Submittal for the initial milestone must contain enough information at a conceptual or master plan level for USACE to understand the scope and scale of the complete Section 408 alteration. The initial submittal must also have the Statement of No Objection, if one is required, reference paragraph 11.a.

(2) For the multi-phased review approach, the district must develop an alteration-specific review plan for the complete alteration, reference paragraph 12.c., and is encouraged to initiate development of the review plan, as soon as possible, including determining if a SAR is required. Milestones will be managed, monitored, and adapted, if necessary, in the district review plan. If a SAR is required, there may be additional review milestones required for design and

construction activities.

d. If there is a situation that involves a long-term or large-scale plan, such as a watershed-based master plan, comprised of the construction of multiple alterations occurring over time, this case should be coordinated vertically through the appropriate RIT to the HQUSACE Section 408 proponent to determine the most efficient process to manage such a request.

11. Basic Requirements for a Complete Section 408 Request. All costs associated with information required for obtaining a Section 408 permission, constructing the alteration if approved, and complying with any conditions associated with the Section 408 permission is at 100 percent cost to the requester. This does not include costs for USACE to conduct the review of the request. Costs associated with USACE review is addressed paragraph 7.f. If submitting information for a categorical permission, reference the process in Appendix C. If the multi-phased review approach is used, then the information needed for a complete Section 408 request may be provided at different milestones for review. Because proposed alterations vary in size, level of complexity, and potential impacts, the procedures and required information to make such a determination are intended to be scalable. Requirements for data, analyses, and documentation may be subject to change as additional information about the Section 408 proposal is developed and reviewed. Determination for the required information for each Section 408 submittal is led by the district. Supplemental information specific to dams, levees, hydropower, and navigation can be found in the appendix appropriate to the type of infrastructure (Appendices E-G). Note, identification of whether or not the proposed alteration also requires Section 10/103/404 authorization should be done up front, and districts should encourage requesters to submit any required Section 10/103/404 request in a manner to facilitate concurrent and efficient reviews with the Section 408 permission request, to the maximum extent practicable. Basic requirements for a complete Section 408 request include the following:

a. Statement of No Objection. 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 property 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 to USACE to initiate the evaluation of the request. Districts must coordinate with non-federal sponsors throughout the review process and ensure feedback from non-federal sponsors is considered prior to USACE rendering a final decision on the Section 408 request. Requesters can ask the USACE district office to facilitate coordination with, and seek to obtain 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 with the following exceptions:

- (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 all operation and maintenance responsibilities for the portion of the USACE project proposed to be altered.

(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 from the non-federal sponsor is not required if the requester could obtain the real property 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 cases in which the alteration is not considered integral to the USACE project, if the 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 written statement documenting the efforts to obtain a Statement of No Objection, and cite the authority and process through which the requester will have the sufficient authority to condemn all real property required for the alteration in the event the Section 408 request is approved by USACE. For these cases, USACE will independently 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. Throughout the USACE review phase, USACE will continue to provide the non-federal sponsor opportunities to provide input on the Section 408 request up until and just before USACE renders a final decision. For these subsequent opportunities for input, districts can use judgment as to the appropriate time in which to provide non-federal sponsors to respond. Approval of the Section 408 under these circumstances does not negate the process the requester must follow in order to obtain the real property needed to construct the alteration, nor provides the requester with eminent domain authority.

(5) A Statement of No Objection is not required if, after a good faith effort, neither the requester nor USACE can locate the non-federal sponsor or the non-federal sponsor's successor. If a requester is able to secure the necessary real property 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.

b. USACE Project and Alteration Description. Basic requirements for a complete Section 408 submittal include the identification of the USACE project and a complete description of the proposed alteration(s), including necessary drawings, sketches, maps, and plans.

c. Technical Analysis and Design.

(1) The requester is responsible for ensuring a proposed alteration meets current USACE design and construction standards. However, a requester is not required to bring those portions or features of the existing USACE project that are not impacted by the alteration up to current USACE design standards. The district will work closely with the requester to determine the applicable USACE standards to be applied and the specific level of detail necessary to be provided in order for USACE to make a decision for a particular alteration request. The district determination of the appropriate level of detail will be risk-informed and documented in the USACE review plan.

(2) Districts will inform the requester if a hydrologic and hydraulic system analysis is required. The purpose of a hydrologic and hydraulics system analysis is to determine the potential hydrologic and hydraulic changes of proposed alterations. Districts will determine if such an analysis is needed and, if so, the appropriate scope of analysis based on the complexity of the proposed alteration. See Appendix H for more details regarding the requirements of a hydrologic and hydraulics system analysis.

(3) For alterations involving professional design services, the requester will be required to submit a certification that the design underwent a quality control process.

(4) If the district determines a SAR is required, a SAR review plan must be developed by the requester and the requester will be required to cover the costs of the SAR. A SAR is required for design and construction activities where potential hazards pose a significant threat to life safety. Districts will work with requesters to coordinate the development of the SAR review plan. See paragraph 12.c.(4).

d. Environmental and Cultural Resources Compliance. A decision on a Section 408 request is a federal action subject to NEPA and other federal environmental and cultural resources compliance requirements, such as Section 7 of the Endangered Species Act (ESA), Section 106 of the NHPA, essential fish habitat (EFH) consultation, tribal consultation, etc. When applicable, government-to-government tribal consultation is inherently a federal obligation and must be conducted in a meaningful, collaborative and effective communication process working toward mutual consensus, to the extent practicable and permitted by law, and begins at the earliest planning stages. Ensuring and conducting environmental and cultural resources compliance for a Section 408 request is the responsibility of USACE. However, the requester is responsible for providing all supporting information and documentation that the district identifies as necessary to assess compliance, such as species surveys, habitat assessments, and/or cultural resource surveys. Requesters may, but are not required to, draft the NEPA environmental

assessment or fund a contractor to prepare an environmental impact statement for a Section 408 request consistent with 40 CFR 1506.5. However, the district must ensure that any NEPA documentation drafted by a requester or contractor is accurate and compliant with USACE and Council on Environmental Quality (CEQ) requirements prior to accepting it for use with the Section 408 request. A final Section 408 request cannot be rendered until the requester has provided all information necessary for the district to complete its assessment for environmental and cultural resources compliance. The district will work with the requester to determine the requirements for the information the requester is required to submit to constitute a complete request. The information required of the requester to facilitate the completion of environmental compliance will be scaled to be commensurate with the degree of potential environmental effects of the activity within the scope of the Section 408 analysis. Environmental and cultural resources compliance for Section 408 requests will typically not require the same level of detailed analysis as needed for feasibility reports or other planning studies. See Appendix D for further information.

(1) Alterations that are expected to not result in significant effects to the environment, both individually and cumulatively, should be evaluated for applicability with the approved categorical exclusions at 33 CFR 230.9. However, activities that qualify for a NEPA categorical exclusion must still satisfy compliance requirements under other statutes such as NHPA and ESA, and must fulfill consultation obligations with federally recognized tribes. Documentation of applicability of a categorical exclusion may be signed by the Section 408 decision-maker or other appropriate district staff.

(2) For categorical permissions, the district will inform the requester if additional documentation is necessary to complete environmental compliance.

(3) Districts are strongly encouraged to adopt and/or incorporate by reference any NEPA documentation that may already exist for the USACE project.

(4) For those alterations in which another federal agency is the NEPA lead agency (e.g. such as when FERC is the lead agency for private hydropower licensing, reference Appendix F), districts will participate in the NEPA review as a cooperating agency to the maximum extent practicable. Districts will typically adopt or incorporate by reference that federal agency's Environmental Impact Statement (EIS) or Environmental Assessment (EA) and consider it to be adequate for NEPA compliance for a Section 408 permission, unless the district finds substantial doubt as to the technical or procedural adequacy or omission of factors important to the Section 408 permission decision. Districts also have discretion to adopt/use another lead federal agency's environmental compliance documentation (ESA, NHPA, EFH, etc.) as allowable and appropriate for the Section 408 permission decision. Districts should ensure that the lead agency is informed of all needs to determine technical adequacy and environmental and cultural resources compliance for the purposes of Section 408 early in the process.

(5) Districts have discretion and are encouraged to develop new or use existing

programmatic NEPA documents (consistent with 40 CFR Part 1500.4(i)) and/or programmatic environmental consultations for Section 408 requests, when appropriate.

(6) Clean Water Act, Section 401 Water Quality Certification. If the requirement for a state water quality certification (33 USC 1341) applies to the alteration that is subject to a Section 408 review, as determined by USACE, then Section 408 authorization cannot be granted until the certification has been obtained or waived, as provided for by statute.

(7) Per USACE tribal consultation policy, federally recognized tribes have the right to request government-to-government consultation with the district. All requests by a tribe for government-to-government consultation with USACE will be honored.

e. Real Estate Requirements. A description of the real property required to support the proposed alteration must be provided. Non-federal sponsors issuing permits, outgrants, or consents for alterations undertaken by others will ensure that the terms of the instrument or agreement are consistent with the terms and conditions of the Section 408 permission, if applicable. If additional real property is required for an alteration that will be integral to the functioning of the USACE project, the district must follow the normal procedures to request approval of any non-standard estates under the guidance in chapter 12 of reference A.28. Maps clearly depicting both existing real property and the additional real property required must also be provided.

f. Operation, Maintenance, Repair, Replacement, and Rehabilitation (OMRR&R). Requesters must identify any projected requirements for OMRR&R needed throughout the life of the proposed alteration and the responsible entity. For instances when there may be a desire for USACE to assume or incorporate operations and maintenance of the proposed alteration as part of its responsibilities for the USACE project being modified, a justification must be provided. See paragraph 9.f.(5) for federal assumption of maintenance associated with navigation features. If operation and maintenance of the USACE project is affected by the alteration, the requester, if not the non-federal sponsor, must provide written documentation that the non-federal sponsor agrees to assume responsibility for the changed OMRR&R of the USACE project at no cost to the federal government. This written documentation must be received prior to USACE issuing the Section 408 decision. If the Section 408 request is approved and an update to the USACE issued O&M manual is needed as the result of the alteration, the requester will be required to provide the district with sufficient information to update the portion of the O&M manual related to the approved alteration. As part of this update, as-builts may be required. See paragraph 17.

g. If applicable, a written statement regarding whether credit under Section 221 of the Flood Control Act of 1970, as amended, or other law or whether approval under Section 204 of WRDA 1986, as amended is being or will be sought must be provided.

12. USACE Review Requirements. In general, each Section 408 request will be reviewed by USACE consistent with the following:

a. Main Determinations.

(1) Impacts to the Usefulness of the USACE Project. The objective of this determination is to ensure that the proposed alteration will not limit the ability of the USACE project to function as authorized and will not compromise or change any authorized project conditions, purposes or outputs. All appropriate technical analyses including geotechnical, structural, hydraulic and hydrologic, real estate, construction, and operations and maintenance requirements, must be conducted, and the technical adequacy of the design must be reviewed. In addition, the district will determine whether or not the alteration is an integral component of the USACE project and therefore, will be treated as a federal component of the USACE project once constructed, including for purposes of the USACE Rehabilitation Program, reference A.29. 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 function and meet its authorized purpose. If at any time it is concluded that the usefulness of the authorized project will be negatively impacted, any further evaluation should be terminated and the requester notified. Section 408 permission will not be granted for a proposed alteration that would have an effect of deauthorizing a USACE project or eliminating an authorized project purpose.

(2) Injurious to the Public Interest. Proposed alterations will be reviewed to determine the probable impacts, including cumulative impacts, on the public interest. Evaluation of the probable impacts that the proposed alteration to the USACE project may have on the public interest requires a careful weighing of all those factors that are relevant in each particular case. The benefits that reasonably may be expected to accrue from the proposal must be compared against its reasonably foreseeable detriments. The decision whether to approve an alteration will be determined by the consideration of whether benefits are commensurate with risks. If the potential detriments are found to outweigh the potential benefits, then it may be determined that the proposed alteration is injurious to the public interest. Factors that may be relevant to the public interest depend upon the type of USACE project being altered and may include, but are not limited to, such things as conservation, economic development, historic properties, cultural resources, environmental impacts, water supply, water quality, flood hazards, floodplains, residual risk, induced damages, navigation, shore erosion or accretion, and recreation. This evaluation should consider information received from key stakeholders, interested parties, tribes, agencies, and the public. As a general rule, proposed alterations that will result in substantial adverse changes in water surface profiles will not be approved. The Regulatory Program also conducts a public interest review and cannot authorize activities that are “contrary to the public interest.” When an activity requires both a Regulatory review and Section 408 review, Regulatory and the office conducting the Section 408 review should closely coordinate and leverage any information to inform their respective analyses to ensure efficiency and consistency, to the extent appropriate.

(3) Legal and Policy Compliance. A determination will be made by the appropriate Office of Counsel as to whether the request meets all legal and policy requirements.

b. **Public Notice.** Districts must make diligent efforts to solicit public input as part of the decision-making process for a Section 408 request. Except for requests that meet an established categorical permission (where a public notice is issued as part of the establishment of the categorical permission), districts should issue a public notice for all Section 408 requests advising interested parties of the proposed alteration for which permission is sought and soliciting information necessary to inform USACE's evaluation and review. At a minimum, public notices should contain the requester, a description of the alteration being proposed, and the location of the alteration. As such, this public notice must be circulated to the public by methods deemed appropriate by the district (e.g., websites, email, social media, or media outlets) as early in the evaluation of a proposed alteration as possible to generate meaningful public and agency input to inform the evaluation and decision-making processes. Because input solicited through the public notice process can inform various aspects of the Section 408 review, such as the public interest determination, environmental compliance, Executive Order 11988, informing navigation stakeholders of alterations located in inland and intracoastal waterways, Section 214 funding agreements, and corresponding Regulatory standard individual permit applications, all effort should be made to ensure the public notice is developed and coordinated in a manner that helps maximize the value and use of the input received, and reduces the potential for issuing multiple public notices for different purposes. Likewise, for those Section 408 requests in which another federal agency is the lead federal agency, districts should coordinate with the lead agency to issue concurrent or joint public notices, when feasible and appropriate. The comment period associated with the public notice should generally be no more than 30 calendar days, but the comment period may deviate from this guideline in order to satisfy multiple purposes (i.e., 60-day comment period for a draft EIS) or to facilitate a joint public notice with another federal agency. Section 408 requests for which an environmental assessment (EA) is prepared or a categorical exclusion is used, draft NEPA compliance documents should not be circulated for public comment, except in rare circumstances. Instead, this public notice soliciting input will serve as the method of involving the public in the NEPA process that is required by 40 CFR 1501.4(e)(1). Environmental compliance may require other consultation and public engagement activities beyond a basic public notice. See Appendix D for more information on environmental compliance.

c. **USACE Review Plan.** The review of each Section 408 request will be conducted in conjunction with a review plan. Districts should ensure requesters understand the review requirements as early in the process as possible. A review plan will define the USACE resource requirements and procedures of how the review and decision for the Section 408 request will be conducted and rendered, respectively. The USACE review team will be subject matter experts based on expertise, experience, and skills, from multiple disciplines as necessary to ensure a comprehensive review. If the requester is not the non-federal sponsor, the review plan must also include opportunities for the non-federal sponsor to provide input on potential impacts to their responsibilities throughout the review process. Districts are encouraged to review information submitted by requesters as the review plan is being finalized, but no final Section 408 decision will be rendered without an approved review plan in place. Section 408 review plans do not

have to be posted on the internet. If a SAR is required, districts and divisions may use discretion to post the SAR report on the district or division website. If the decision is made to post the SAR report, districts and/or divisions will ensure appropriate protection of sensitive or security related information when posting the SAR report.

(1) For categorical permissions, the review and validation process is established and documented as part of the creation of the categorical permission; therefore, no separate review plan is needed. Reference Appendix C for additional information for categorical permissions.

(2) Districts have the option to develop an overarching review plan, called a Procedural Review Plan, that establishes the review procedures to be used for Section 408 requests similar in nature and that have similar impacts and do not require a Safety Assurance Review (SAR), reference paragraph 12.c.(4). Procedural Review Plans are approved by the Division Commander; however, the Division Commander may delegate signature authority for the Procedural Review Plan to either the Division Regional Programs Director or the Division Regional Business Director. Districts must review and update approved Procedural Review Plans on an annual basis. The division must reapprove the Procedural Review Plans if there are any significant changes in scope or process.

(3) Districts must develop alteration-specific review plans for Section 408 requests that are not covered by a categorical permission or Procedural Review Plan. Section 408 requests using the multi-phased review approach, reference paragraph 10.c., or requiring a SAR, must have an alteration-specific review plan. If the multi-phased review approach is being used, documentation of established milestones will be managed in the district's review plan for the Section 408 request. Milestones can be adjusted as part of the process for updating the review plan. The decision-maker for the Section 408 request, reference paragraph 8, will be the approver of alteration-specific review plans. For example, if the decision-maker is the Division Commander, the Division Commander or the Division Commander's designee must approve the review plan. The Division Commander may delegate signature authority for the review plan to either the Division Programs Director or the Division Regional Business Director. If the Section 408 is to be approved by the District Commander, the District Commander must approve the review plan and so on. The division may choose to approve alteration-specific review plans that could be approved at the district level. Approved alteration-specific review plans must be updated as needed; however, if there are any significant changes in scope or process of the review, then the review plan must be reapproved at the appropriate approval level. The Review Management Organization (RMO) responsibilities can be at the level in which the Section 408 decision is made, with the exception of Section 408 requests that require a SAR, reference paragraph 12.c.(4). See reference A.40 for RMO responsibilities.

(4) The district Chief of Engineering will refer to reference A.40, or subsequent policy, to determine if a SAR is required for a proposed alteration. For alterations involving a levee or dam, this decision will be made in consultation with the district Dam Safety Officer or Levee Safety Officer when they are not the same person as the Chief of Engineering. If the district

determines a SAR is required, an alteration-specific review plan must be developed and the Risk Management Center (RMC) will be assigned as the RMO for the entire Section 408 review including the SAR. The final alteration-specific review plan and SAR review plan must be endorsed by the RMC and approved by the Division Commander or the Division Commander's designee. The Division Commander may delegate signature authority for the review plan to either the Division Regional Programs Director or the Division Regional Business Director. The district will work with the requester in the development of the review plan for the SAR. The district will include the requester's SAR review plan as an appendix to the USACE alteration-specific review plan.

13. Overall Process. The overall USACE review process for Section 408 requests involves four main steps: completeness determination (reference paragraph 14); review and decision (reference paragraph 15); final decision notification (reference paragraph 16); and construction oversight (reference paragraph 17). All information submitted by the requesters should be transmitted to the appropriate USACE district office having jurisdiction over the USACE project being altered.

a. The first submittal of information to the USACE district office should have a cover letter signed by the entity requesting the Section 408 permission.

b. Submittals may be accepted electronically (such as by email or file transfer) or by hard copy. When the initial submittal is received, the district will create a database entry for that request, including the assignment of a unique identifier (to be automatically generated by the Section 408 database). The unique identifier will be used for tracking purposes throughout the entire Section 408 request process and will be referenced in all correspondence with the requester.

c. USACE will provide timely responses to requesters regardless of the type of Section 408 request or the stage of the review. Districts and divisions should prioritize work in a manner to support timely responses and decisions (and within the timelines specified in paragraphs 14 and 15) to the maximum extent practicable.

d. Written notifications by districts to requesters can be provided by the district electronically or by hardcopy, depending on the preference of the requester. Districts will tailor content of the written notifications to each given situation. See Appendix J for example letters to requesters.

e. At any time in the process, a requester may choose to withdraw their Section 408 request in writing. In this case, the district will record the date of withdrawal in the Section 408 database.

f. For Section 408 requests involving funding agreements, the time required to develop and execute funding agreements, reference paragraph 7.g., themselves will not be subject to the

notification timelines referenced in paragraphs 14 and 15. The districts will ensure timely responses and engagement in developing and executing funding agreements.

g. The written notifications to requesters may be issued and signed by the Section 408 Coordinator or other signatory designated by the District Commander, except for final decision notifications. Final decision notifications for validation of categorical permissions, single-phased decisions, or multi-phased review decisions will follow appropriate decision processes as specified in paragraph 8.

14. Step 1: Completeness Determination. This first part of the process involves the requester providing information to the district in one or more submittals in order to satisfy all the basic requirements of a complete Section 408 request as indicated in paragraph 11. When a requester submits information to a district office, districts are expected to provide a written completeness determination within 30 days of receipt. If the district determines a submittal is not complete, the district will provide the requester a written notification within 30 days of receipt, providing a description of what information is required in order for the submittal to be complete. The 30 day timeline for a completeness determination is then restarted upon any subsequent submittals of information. A submittal will be determined complete and therefore initiating the 90-day review and decision step (reference paragraph 15) when it meets one of the following scenarios:

a. For categorical permissions, information submitted by the requester will be considered complete when the information provided demonstrates the proposed alteration appears to meet the conditions of an established categorical permission. If the district can validate the use of the categorical permission based on the information in the submittal of information within 30 days of receipt, then the district can proceed and grant permission under the categorical permission and notify the requester in lieu of providing a completeness determination letter. If not, then the 90-day review and decision step will be initiated with the district providing a written notification that the submittal seeking authorization under a categorical permission is complete.

b. For requests using the multi-phased review approach, a completeness determination will be done on each milestone submittal. The requirements to determine what information is required for each milestone should be pre-determined and planned by agreement between the district and requester. When a district issues a written notification that a milestone is complete, that will initiate the 90-day review and decision step for that milestone.

c. For requests intended for a single-phased review, a submittal will be determined complete when all the basic requirements, reference paragraph 11, has been submitted. When a district issues a written notification that all basic requirements have been submitted, that will initiate the 90-day review and decision step for that Section 408 request.

d. If after evaluating the information provided by a requester the district determines that processes in this EC do not apply, the district will provide the requester a written notification within 30 days of receipt of the information with a description of why this EC would not apply

and any other recommendations for the requester's next course of action, if needed.

15. Step 2: USACE Review and Decision. During this step, USACE will evaluate the information provided for the completeness determination following the review requirements in paragraph 12. This second step of the process results in USACE providing a final decision for either validating use of a categorical permission; a specific milestone; or a complete Section 408 request. Approval of the use of a categorical permission or a complete single-phase Section 408 request means that the requester can proceed to construction of the alteration, subject to specified conditions. Approval of a specific milestone results in the requester proceeding to the next milestone, unless the submittal is the final milestone. Approval of the final milestone constitutes approval of the entire Section 408 request; must be rendered by the appropriate Section 408 decision-maker (reference paragraph 8); and results in the requester being able to proceed to construction of the alteration, subject to specified conditions. Approved alterations for construction must result in a fully functional element once construction is complete.

a. Timeline for Review and Final Decision. A final decision will be provided by USACE to the requester within 90 days from the date the completeness determination was made by the district, unless one of the following stipulations apply. This 90-day timeframe is inclusive of the time needed for division review and decision, if required, and issuance of the final notification (reference paragraph 16).

(1) If a final decision cannot be made within 90 days, the district will provide a written notification to the requester with an estimated decision date. If the decision date extends beyond 120 days from a completeness determination, the district will send a memorandum through the Division Commander to the Director of Civil Works with a description of the Section 408 request and a justification for the decision extending beyond 120 days. HQUSACE will provide this information to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives.

(2) There may be cases during the USACE review and decision phase in which it is identified that more information is needed to render a final decision. If the additional information is needed to support or clarify the pending Section 408 request, the coordination for obtaining the additional information can be done informally between the district and requester. The 90-day timeframe for the final decision is not paused during this informal coordination. If this coordination causes the USACE review and decision timeframe to extend beyond 90 days, follow procedures in paragraph 15.a.(1). If the need for additional information is triggered by a change in the scope or scale of the alteration to the extent that it would require significant new information, such as new technical analyses, development of supplemental/re-initiation of environmental compliance, and/or additional real estate review, the USACE review should stop and the request should be withdrawn. This action will cease the 90-day review and decision timeline. The district then must provide written notification to the requester that a new request should be submitted to reflect the change in scope of the alteration. When the requester submits all of the required information, a new completeness determination will be made (subject to the

30-day timeline in paragraph 14) and the 90-day timeline will be restarted from the date of the new completeness determination.

b. Summary of Findings. The district will create a Summary of Findings (content and format scalable to the request) to serve as the decision document to summarize the administrative record, including the review findings and the basis for the final Section 408 decision. A Summary of Findings does not have to be developed for each individual milestone for the multi-phased review approach, but is required when the final milestone is reviewed and must summarize the entire Section 408 decision collectively. The Summary of Findings must include the following, as a minimum:

- (1) USACE project description and authorization;
- (2) Brief description of the request;
- (3) Description and reference to the review plan process followed, including SAR determination;
- (4) Summary of rationale and conclusions for recommending approval or denial, including determinations for the impact to the usefulness of the USACE project; whether or not the alteration is considered integral to the USACE project; and impacts to the public interest;
- (5) Certification of legal sufficiency by Office of Counsel;
- (6) Certification by the District Chief of Real Estate Division that all real property required for the proposed alteration has been identified; the identified real property is sufficient to support the alteration; and the proposed alteration will not adversely affect the USACE project's real property. If the proposed alteration will be integral to the functioning of the USACE project, the District Chief of Real Estate Division must also certify that standard estates are being used for the acquisition of any new real property that will become or may become a part of the USACE project, or that the requester is seeking approval to use non-standard estates (see paragraph 11.e.);
- (7) Description of any related, ongoing USACE studies (if applicable), including how the proposed alteration may impact those studies;
- (8) Summary of input from the non-federal sponsor, if the non-federal sponsor is not the requester demonstrating that the district provided opportunity for the non-federal sponsor to review and evaluate the proposed alteration along with the technical analysis and design, environmental effects, real estate requirements, and potential O&M effects and that the district sought to incorporate the non-federal sponsors feedback and concerns into the decision-making process;

(9) Summary of any changes to the O&M manual;

(10) If the district has determined that USACE would assume O&M responsibilities as part of its responsibilities for the USACE project, include the rationale and any anticipated increase in USACE O&M costs or if changes to O&M requirements would have to be implemented by the non-federal sponsor, documentation that the non-federal sponsor has agreed to those changes to their responsibilities;

(11) The NEPA Finding of No Significant Impact or Record of Decision, if the NEPA decision has not already been documented (such as applicability of a categorical exclusion, validation of a categorical permission, or an EIS led by another federal agency); and,

(12) Any additional final conclusions or information, including any associated controversial issues.

16. Step 3: Final Decision Notification. The district is responsible for providing a written decision signed by the USACE deciding official to the requester for all final Section 408 decisions, regardless of the decision level. This written decision must be issued within the 90-day review and decision timeline.

a. For those requests in which the non-federal sponsor is not the requester, USACE will coordinate the final decision with the non-federal sponsor.

b. If the final decision is to deny the request, the requester will be advised in writing as to the reason(s) for denial.

c. If the final decision is to approve the Section 408 request, the district will provide a written approval document. For cases involving a categorical permission, the written approval will be validation that the categorical permission is applicable.

d. In situations in which the district is evaluating a Regulatory standard individual permit application and Section 408 combined, reference paragraph 7.h.(4) and 7.h.(5), the district will ensure the final Section 408 decision letter and associated conditions be part of the single transmittal letter with the Regulatory permit.

e. Standard Terms and Conditions. At a minimum, the standard terms and conditions in Appendix K, except where noted as optional, must be included in all Section 408 approval notifications, including validation of use of a categorical permission. Districts and divisions may include any necessary special conditions as requirements for approval.

17. Step 4: Construction Oversight. District costs for construction oversight and closeout should be incorporated as part of review costs for the Section 408 request.

a. Construction oversight. The district should develop procedures for monitoring construction activities, including reviewing construction documentation at different phases if necessary, for the approved Section 408 request scaled to the complexity of the alteration to ensure the alteration is constructed in a manner consistent with the permission conditions. If a SAR was required, there may be SAR activities that carry through during construction. Any concerns regarding construction should be directed to the Section 408 requester (and the non-federal sponsor if applicable) for resolution.

b. As-builts. Plans and specifications with amendments during construction showing alterations as finally constructed will be furnished by the Section 408 requester after completion of the work if required by the district. As-builts must be provided to the district and the non-federal sponsor (if the requester is not the non-federal sponsor) within 180 days of construction completion.

c. O&M Manual Updates. The Section 408 requester is required to provide the district with sufficient information to update the portions of the USACE issued O&M manual to reflect changes as a result of the constructed alteration if necessary. If the requester was not the non-federal sponsor, the non-federal sponsor must be given an opportunity to review all proposed changes to the O&M manual. O&M manual updates may range from simple removal and replacement of paragraphs or entirely new manuals depending on the scope and complexity of the alteration. The district is responsible for reviewing and approving any updates needed to the O&M manual as a result of the alteration. At a minimum, the update should include a description of the new features, reference to the Section 408 approvals, as-builts, and instructions regarding O&M of any new features not included in the existing manual. Reference A.32 and A.34 for information on O&M manuals.

d. Post Construction Closeout. District may need to conduct a post construction on-site inspection of the completed alteration to document final condition of the USACE project.

18. Enforcement.

a. Inspection and monitoring of approved and in-place alterations will be incorporated into the inspection and oversight procedures for that specific USACE project.

b. The policy of USACE is to pursue enforcement and correction of unauthorized alterations. If an unauthorized alteration is discovered, the district, after consulting with the Offices of Counsel and Real Estate, will take the appropriate steps to remedy the unauthorized alteration. Coordination with the district Regulatory office should also occur so it can be determined if any action should be taken with respect to Section 10/404/103. Regulatory funds cannot be used for enforcement and correction of unauthorized alterations. Specific enforcement steps the district takes will depend on the particular nature of the unauthorized alteration and whether the unauthorized alteration is located on project boundaries where a non-federal sponsor holds the land rights for operations and maintenance. Non-federal sponsors with operations and

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maintenance responsibilities for the USACE project remain responsible for ensuring no unauthorized alterations are occurring within the project boundaries.

FOR THE COMMANDER:



JAMES C. DALTON, P.E.
Director of Civil Works

APPENDIX A

References*

*Other appendices in this EC have additional references listed.

- A.1. Rivers and Harbors Act of 1899, <https://www.gpo.gov>
- A.2. Federal Power Act of 1920, <https://www.gpo.gov>
- A.3. Section 106 of the National Historic Preservation Act of 1966, <https://www.gpo.gov>
- A.4. Flood Control Act of 1970, as amended, <https://www.gpo.gov>
- A.5. National Environmental Policy Act of 1970, <https://www.gpo.gov>
- A.6. Section 103 of the Marine Protection, Research, and Sanctuaries Act, <https://www.gpo.gov>
- A.7. Section 404 of the Clean Water Act of 1972, <https://www.gpo.gov>
- A.8. Section 7 of the Endangered Species Act of 1973, <https://www.gpo.gov>
- A.9. Section 204 of Water Resources Development Act of 1986, as amended, <https://www.gpo.gov>
- A.10. Section 214 of Water Resources Development Act of 2000, as amended, <https://www.gpo.gov>
- A.11. Section 2036 of Water Resources Development Act of 2007, <https://www.gpo.gov>
- A.12. Section 1005(b) of Water Resources Reform and Development Act of 2014, <https://www.gpo.gov>
- A.13. Title 41 of the Fixing America's Surface Transportation Act (FAST-41), <https://www.gpo.gov>
- A.14. Section 1156(a)(2) of Water Resources Development Act of 2016, <https://www.gpo.gov>
- A.15. 10 USC 2695 - Acceptance of funds to cover administrative expenses relating to certain real property transactions, <https://www.gpo.gov>
- A.16. 23 USC 139 - Efficient environmental reviews for project decision making, <https://www.gpo.gov>
- A.17. 30 USC 185 - Rights-of-way for pipelines through federal lands, <https://www.gpo.gov>
- A.18. 33 USC 408 - Taking possession of, use of, or injury to harbor or river improvements, <https://www.gpo.gov>
- A.19. 33 CFR 208.10 - Local Flood Protection Works; Maintenance and Operation of Structures and Facilities, <https://www.gpo.gov>
- A.20. 33 CFR 230 - Procedures for Implementing NEPA, <https://www.gpo.gov>
- A.21. 33 CFR 329 - Definition of Navigable Waters of the United States, <https://www.gpo.gov>
- A.22. 36 CFR 327 - Rules and Regulations Governing Public Use of Water Resources Development Projects Administered by the Chief of Engineers, <https://www.gpo.gov>
- A.23. 36 CFR 800 - Protection of Historic Properties, <https://www.gpo.gov>
- A.24. 40 CFR 1500-1508 - CEQ Regulations for Implementing the Procedural Provisions of NEPA, <https://www.gpo.gov>
- A.25. 50 CFR 402 - Interagency Cooperation - Endangered Species Act of 1973, as amended, <https://www.gpo.gov>

- A.26. Executive Order 11988 - Floodplain management, <https://www.archives.gov>
- A.27. AR 405-80, Management of Title and Granting Use of Real Property, <http://www.aschq.army.mil>
- A.28. ER 405-1-12, Real Estate Handbook, <https://www.publications.usace.army.mil>
- A.29. ER 500-1-1, Emergency Employment of Army and Other Resources - Civil Emergency Management Program, <https://www.publications.usace.army.mil>
- A.30. ER 1105-2-100, Planning Guidance Notebook, <https://www.publications.usace.army.mil>
- A.31. ER 1110-1-1807, Drilling in Earth Embankment Dams and Levees, <https://www.publications.usace.army.mil>
- A.32. ER 1110-2-401, Operation, Maintenance, Repair, Replacement, and Rehabilitation Manual for Projects and Separable Elements Managed by Project Sponsors, <https://www.publications.usace.army.mil>
- A.33. ER 1130-2-500, Partners and Support (Work Management Policies), <https://www.publications.usace.army.mil>
- A.34. ER 1130-2-550, Recreation Operations and Maintenance Policies, <https://www.publications.usace.army.mil>
- A.35. ER 1165-2-26, Implementation of Executive Order 11988 on Floodplain Management, <https://www.publications.usace.army.mil>
- A.36. ER 1165-2-208, In-Kind Contribution Credit Provisions of Section 221(a)(4) of the Flood Control Act of 1970, as amended, <https://www.publications.usace.army.mil>
- A.37. ER 1165-2-211, Operation and Maintenance of Improvements Carried Out by Non-Federal Interests to Authorized Harbor or Inland Harbor Projects, <https://www.publications.usace.army.mil>
- A.38. ER 1165-2-504, Construction of Water Resource Development Projects by Non-Federal Interests, <https://www.publications.usace.army.mil>
- A.39. EP 1130-2-550, Recreation Operations and Maintenance Guidance and Procedures, <https://www.publications.usace.army.mil>
- A.40. EC 1165-2-217, Review Policy for Civil Works, <https://www.publications.usace.army.mil>
- A.41. Director's Policy Memorandum, Civil Works Programs, No. DPM CW 2018-06, Designation of a Lead USACE District for Permitting of Non-USACE Projects Crossing Multiple Districts or States, dated 15 May 2018
- A.42. Council on Environmental Quality, *Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act*, dated 6 March 2012, <https://ceq.doe.gov>
- A.43. Council on Environmental Quality, *Establishing, Applying and Revising Categorical Exclusions under the National Environmental Policy Act*, dated 23 November 2010, <https://ceq.doe.gov>

APPENDIX B

33 USC 408

Below is the direct language of 33 USC 408.

§408. Taking possession of, use of, or injury to harbor or river improvements

(a) Prohibitions and permissions

It shall not be lawful for any person or persons to take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, or any piece of plant, floating or otherwise, used in the construction of such work under the control of the United States, in whole or in part, for the preservation and improvement of any of its navigable waters or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks, nor remove for ballast or other purposes any stone or other material composing such works: *Provided*, That the Secretary of the Army may, on the recommendation of the Chief of Engineers, grant permission for the temporary occupation or use of any of the aforementioned public works when in his judgment such occupation or use will not be injurious to the public interest: *Provided further*, That the Secretary may, on the recommendation of the Chief of Engineers, grant permission for the alteration or permanent occupation or use of any of the aforementioned public works when in the judgment of the Secretary such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work.

(b) Concurrent review

(1) NEPA review

(A) In general

In any case in which an activity subject to this section requires a review under the National Environmental Policy Act of 1969 (42 USC 4321 et seq.), review and approval of the activity under this section shall, to the maximum extent practicable, occur concurrently with any review and decisions made under that Act.

(B) Corps of Engineers as a cooperating agency

If the Corps of Engineers is not the lead Federal agency for an environmental review described in subparagraph (A), the Corps of Engineers shall, to the maximum extent practicable and consistent with Federal laws-

(i) participate in the review as a cooperating agency (unless the Corps of Engineers does not intend to submit comments on the project); and

(ii) adopt and use any environmental document prepared under the National Environmental Policy Act of 1969 (42 USC 4321 et seq.) by the lead agency to the same extent that a Federal agency could adopt or use a document prepared by another Federal agency under-

(I) the National Environmental Policy Act of 1969 (42 USC 4321 et seq.); and

(II) parts 1500 through 1508 of title 40, Code of Federal Regulations (or successor regulations).

(2) Reviews by Secretary

In any case in which the Secretary must approve an action under this section and under another authority, including sections 401 and 403 of this title, section 1344 of this title, and section 1413 of this title, the Secretary shall-

(A) coordinate applicable reviews and, to the maximum extent practicable, carry out the reviews concurrently; and

(B) adopt and use any document prepared by the Corps of Engineers for the purpose of complying with the same law and that addresses the same types of impacts in the same geographic area if such document, as determined by the Secretary, is current and applicable.

(3) Contributed funds

The Secretary may accept and expend funds received from non-Federal public or private entities to evaluate under this section an alteration or permanent occupation or use of a work built by the United States.

(c) Timely review

(1) Complete application

On or before the date that is 30 days after the date on which the Secretary receives an application for permission to take action affecting public projects pursuant to subsection (a), the Secretary shall inform the applicant whether the application is complete and, if it is not, what items are needed for the application to be complete.

(2) Decision

On or before the date that is 90 days after the date on which the Secretary receives a complete application for permission under subsection (a), the Secretary shall-

(A) make a decision on the application; or

(B) provide a schedule to the applicant identifying when the Secretary will make a decision on the application.

(3) Notification to Congress

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In any case in which a schedule provided under paragraph (2)(B) extends beyond 120 days from the date of receipt of a complete application, the Secretary shall provide to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives an explanation justifying the extended timeframe for review.

APPENDIX C

Categorical Permissions

C-1. Purpose. The purpose of this appendix is to provide supplemental information on categorical permissions including the process to establish categorical permissions and the use of a categorical permission with a Section 408 request. This appendix should be used in conjunction with the guidance in the main EC.

C-2. References. See Appendix A for a list of relevant references.

C-3. Policy. Categorical permissions are intended to be a flexible tool for districts, divisions, and HQUSACE to use in order to streamline the approval of “categories” of alterations that are similar in nature and that have similar effects to a USACE Civil Works project and impacts to the environment. The premise behind a categorical permission is that a USACE office identifies a specific and commonly occurring set of activities that require Section 408 permissions within a specified geographic area that, both individually and cumulatively, have been determined not to impact the usefulness of the USACE project(s); associated environmental impacts are less than significant; and the activities would not be injurious to the public interest.

a. A categorical permission is not the same as a NEPA categorical exclusion. The analysis of potential effects to the USACE project, public interest, and NEPA and other environmental and cultural resources compliance for the identified activities is done in advance to establish the categorical permission, and then individual Section 408 requests are reviewed for compliance with the established categorical permission. For those individual Section 408 requests that are consistent with the terms and conditions of a categorical permission, Section 408 permission can be granted with an abbreviated validation process to determine that the terms and conditions are met. The decision letter used to document the use of a categorical permission can include any additional clarifying environmental documentation necessary, likely avoiding the need for a separate NEPA document.

b. A categorical permission may be created at the district, division, or HQUSACE level, but must be approved by a District Commander, Division Commander, or the Director of Civil Works depending upon the region in which it is applicable. Validation that a Section 408 request is consistent with the terms and conditions of a categorical permission and subsequent authorization of the activity under the categorical permission may be delegated. The delegation should be established through the process used to create the categorical permission.

c. A categorical permission can be developed at any geographic scale so long as the effects can be meaningfully generalized across that scale. The use of terms and conditions to limit what activities can proceed under a categorical permission may be essential to successfully establishing a categorical permission. For example, it may be necessary to limit a categorical permission to actions that occur outside of areas designated under the Endangered Species Act

(ESA) as critical habitat or outside of areas subject to tribal treaty rights. Categorical permissions can be limited to not apply at all in those circumstances, or they can require the resolution of ESA consultation requirements or tribal coordination on a project-specific basis before validation of the categorical permission can be granted.

d. Potential categorical permissions should be coordinated with those non-federal sponsors with responsibility for the USACE projects that would be covered. Non-federal sponsors should be given opportunity to provide input on all aspects of the proposed categorical permission, with specific attention to concerns regarding impacts on their O&M responsibilities and public interest considerations. The categorical permission may include terms and conditions to address issues associated with the non-federal sponsor O&M responsibility. For example, a categorical permission could require requesters, if the requester is not the non-federal sponsor, to obtain a Statement of No Objection and/or require review by the non-federal sponsor prior to submitting the request to USACE.

C-4. Establishing Categorical Permissions.

a. Categorical permission development follows similar steps as the process to develop a programmatic NEPA document, but requires an evaluation of the potential effects to the USACE Civil Works project (such as structural and operational effects), public interest, and the potential environmental and cultural resources effects of the covered activities. The basic process will include:

(1) scoping;

(2) conducting an initial assessment of potential impacts to the USACE project to ensure the scope is appropriate for a categorical permission;

(3) development of the draft categorical permission with special conditions;

(4) soliciting non-federal sponsor input;

(5) making the draft categorical permission available for public comment and tribal government-to-government consultation. In addition, there will be opportunities for a public hearing afforded;

(6) developing a final categorical permission and decision document after taking into consideration all input and making necessary revisions; and

(7) making the final categorical permission publicly available on appropriate USACE websites.

b. All proposed and final categorical permissions should explicitly state that a categorical

permission satisfies the Section 408 requirements only and that landowner permission and any other applicable federal, state, or local permits need to be secured before work can begin, including any applicable and required Regulatory Program authorization. Appropriate district staff should ensure the categorical permission decision is coordinated with the Section 10/404/103 permit decision if both are required.

c. When establishing a categorical permission, the district, division, or HQUSACE should develop:

(1) the detailed description and scope of the activities that are proposed to be covered by the categorical permission;

(2) the geographic area in which the categorical permission applies;

(3) the specific USACE project(s) or types of USACE projects to which the categorical permission applies;

(4) a list of circumstances that, if present, would disqualify an otherwise in-scope activity from using the categorical permission (such as the possibility for adverse effects to endangered species in the area);

(5) a summary of findings that supports the determination that all activities within the defined parameters of the categorical permission do not impair the usefulness of the applicable USACE project(s) and are not injurious to the public interest, as well as the NEPA decision document (categorical exclusion, finding of no significant impact (FONSI), or ROD, as appropriate) for the categorical permission;

(6) a description of what documentation is to be submitted to USACE by the entity requesting Section 408 permission in order to validate the applicability of the categorical permission for a specific activity;

(7) an appropriate period of validity for the categorical permission (i.e., expiration date), if appropriate; and

(8) the process for USACE staff to use to validate the applicability of the categorical permission and inform the requester of whether the activity is authorized under the categorical permission, including the identification of the decision level for the validation.

C-5. Implementing Categorical Permissions.

a. For individual Section 408 requests involving the validation of use of a categorical permission, a written decision will be provided to the requester. The written approval should attach or include any terms and conditions of the categorical permission with the approval letter.

b. The organizational level that developed the categorical permission should also develop a process to periodically conduct a review or audit of the categorical permission itself to ensure that its use continues to meet its intended purpose to not impair the usefulness of the applicable USACE project(s) and not be injurious to the public interest. Should the review or audit demonstrate that the categorical permission is not meeting its intended purpose, the District Commander, Division Commander, or Director of Civil Works, as appropriate, has the authority to suspend or revoke the categorical permission.

APPENDIX D

Environmental and Cultural Resources Compliance

D-1. Purpose. The purpose of this appendix is to provide supplemental policy guidance on conducting environmental and cultural resources compliance inclusive of NEPA compliance for Section 408 permission requests. This appendix should be used in conjunction with the guidance in the main EC.

D-2. References. The following are the primary references that are most relevant to environmental and cultural resources compliance for Section 408 permissions. There are multiple other federal statutes, Executive Orders, and regulations that potentially may be applicable to a specific Section 408 permission request. Districts should consult with environmental staff and/or counsel to determine which laws and regulations are applicable to a given request.

- a. Rivers and Harbors Act of 1899
- b. National Environmental Policy Act
- c. Endangered Species Act of 1973
- d. National Historic Preservation Act
- e. Clean Water Act of 1972
- f. 33 CFR Part 230 Procedures for Implementing NEPA
- g. 40 CFR Part 1500-1508 Council on Environmental Quality (NEPA)
- h. Establishing, Applying and Revising Categorical Exclusions under the National Environmental Policy Act, Council on Environmental Quality (2010)
- i. Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act, Council on Environmental Quality (2012)
- j. Council on Environmental Quality CEQ Information Memorandum to Agencies Containing Answers to 40 Most Asked Question on NEPA Regulations (46 FR 34263-68, July 28, 1983)

D-3. Policy.

a. A decision on a Section 408 request is a federal action subject to NEPA and other federal environmental and cultural resources compliance requirements such as Section 7 of the Endangered Species Act, Section 106 of the National Historic Preservation Act, essential fish habitat consultation, and tribal consultation, etc. Environmental and cultural resources compliance efforts should be conducted concurrently with the Section 408 review process to the maximum extent practicable. Environmental and cultural resources compliance, except those prepared for Regulatory permit decisions, must be completed prior to rendering a Section 408 permission decision.¹ Environmental and cultural resources compliance efforts should be commensurate with the degree of potential environmental and cultural effects of the activity within the scope of the Section 408 analysis.

b. Ensuring and conducting environmental and cultural resources compliance for a Section 408 request is the responsibility of USACE. However, the requester is responsible for providing all supporting information and documentation that the district identifies as necessary to assess compliance, such as species surveys, habitat assessments, and/or cultural resource surveys. Requesters may, but are not required to, draft the NEPA environmental assessment or fund a contractor to prepare an environmental impact statement for a Section 408 request consistent with 40 CFR 1506.5. The district must ensure that any NEPA documentation drafted by a requester or contractor is accurate and compliant with USACE and CEQ requirements prior to accepting it for use with the Section 408 request. A final Section 408 decision cannot be rendered until the requester has provided all information necessary for the district to complete its assessment for environmental and cultural resources compliance. The district will work with the requester to determine the requirements, which will be scaled to be commensurate with the degree of potential environmental effects of the activity within the scope of the Section 408 analysis.

c. USACE has jurisdiction under Section 408 only over the specific activities or portions of activities that have the potential to alter, occupy, or use a USACE project. Therefore, if a proposed alteration is part of a larger project that extends beyond the USACE project boundaries, the district should focus its analysis for environmental and cultural resources compliance on only those portions or features of the larger project that USACE has sufficient federal control and responsibility to review. The scope of analysis for environmental and cultural resources compliance for the Section 408 review should be limited to the area of the alteration and those adjacent areas that are directly or indirectly affected by the alteration. For example, a pipeline or highway can extend for many miles on either side of a USACE project boundary. In this example, the scope of analysis for Section 408 review should be limited to the effects of the pipeline or highway construction within the USACE project boundary and limited adjacent area to the extent that the location of the impacts are determined by the route within the USACE project boundary, but would not address those portions of the pipeline or highway construction that are sufficiently removed from the USACE project boundary. In contrast, a proposed

¹ Compliance and decision-making under Regulatory authorities (Section 10/404/103) is conducted by the Regulatory component within the applicable district. All final Regulatory permit decisions will be made concurrent with or after the corresponding Section 408 decision.

alteration that would increase the design level throughout a federally authorized levee system would likely significantly overlap the footprint of the USACE project such that the scope of analysis for environmental and cultural resources compliance would include all of the requester's activities. As a general rule, if there are features of a larger project occurring outside of the USACE project boundaries that are integral to the features of the larger project altering a USACE project that they cannot be meaningfully distinguished (e.g., a setback levee that is located outside of the original project boundary of the levee being replaced), the USACE Section 408 scope of analysis should be broad enough to address all those features/activities. Generally, elements of the larger project that are not integral to the features that would alter the USACE project should not be included in the USACE environmental and cultural resources compliance analysis. The scope of analysis should generally be similarly limited to include operations and maintenance of a proposed alteration only to the extent that the operation and maintenance of the alteration would affect the USACE project. However, in some cases the scope of analysis for operational effects may be broader than the scope of analysis for construction effects and may extend beyond the USACE project boundary. Note that the scope of analysis for a Section 408 request may be different than the scope of analysis for a Regulatory permit review (Sections 10/404/103) for the same proposal because the geographic extent of jurisdiction under each authority may be different.

d. Programmatic Compliance. Districts have discretion and are encouraged to develop new or use existing programmatic NEPA documents and/or programmatic environmental consultations for Section 408 permission requests, when appropriate. Programmatic NEPA documents and other environmental consultations (e.g., Programmatic or Regional Biological Opinions, Section 106 Programmatic Agreements, and Standard Local Operating Procedures for Endangered Species [SLOPES]) provide a way to efficiently conduct environmental compliance for categories of activities that have similar environmental effects.

e. Historic, Cultural, and Archaeological Resources. Districts should follow the regulations within 36 CFR 800 for complying with Section 106 of the NHPA when acting as the lead agency as outlined in 36 CFR 800.2(a)(2) for Section 106 compliance. The undertaking within the context of 36 CFR 800.16(y) is limited to the activity within the jurisdiction of USACE that requires permission under Section 408 (see paragraph D-3.c. above). The area of potential effects for a Section 408 request should therefore, be limited to the areas directly or indirectly affected by the limited scope of the undertaking. Section 106 compliance will be satisfied using Regulatory's compliance when the Regulatory element is the lead for environmental compliance on an action that requires both Section 408 and Regulatory authorization and activities and impacts within the scope of each review are the same. For Section 408 requests, the section on cultural resources within Appendix C of reference A.30 does not apply.

f. Tribal Consultation.

(1) USACE recognizes the sovereign status of federally recognized tribes and its obligations for pre-decisional government-to-government consultation. USACE also recognizes that

working with representatives from tribal nations, it can determine whether an area has tribal cultural, historic or spiritual significance. USACE further recognizes that tribes possess their own individual culture, histories, languages, customs and that tribal traditional knowledge is unique to each tribe and it will be used to inform the Section 408 review process. As a result, consultation may occur with individual tribes in bi-lateral engagement or with multiple tribes that have consented to consult in a multi-lateral engagement.

(2) Districts are required to ensure that meaningful government-to-government consultation occurs early in the review process of a Section 408 request. Consistent with the USACE tribal consultation policy, districts should involve the tribes in open, timely, meaningful, collaborative, and deliberative communication process that emphasizes trust and respect throughout review and decision-making process. During consultation districts should, to the extent practicable and permitted by law, work toward mutual consensus during consultation in an active and respectful dialogue concerning actions that may significantly affect tribal resources, tribal rights (including Treaty rights) or Indian lands. Tribal consultation is not bound nor limited to specific timelines. Districts must ensure early coordination with district tribal liaisons to identify any tribal issues (i.e., tribal holidays, timing of Tribal Council meetings, etc.) that could impact timelines prescribed in this EC. Per the USACE tribal consultation policy, federally recognized tribes have the right to request government-to-government consultation with the district. All requests by a tribe for government-to-government consultation with USACE will be honored.

g. Fish and Wildlife Coordination Act. If the proposed alteration would impound, divert, or otherwise control or modify any stream or other body of water (including channel deepening), consultation under the Fish and Wildlife Coordination Act is required. Districts must ensure that the US Fish and Wildlife Service (USFWS) and applicable state wildlife resources agency have an opportunity to provide input and recommendations regarding the impact of the action on wildlife resources. Districts should document the outreach to the wildlife resource agencies. Districts must integrate any reports or recommendations received in the documentation for the Section 408 decision along with an explanation of how that input was considered. However, districts should not be providing funds to USFWS to conduct this consultation for Section 408 requests.

h. Mitigation. Mitigation may include avoiding, minimizing, rectifying, reducing, and/or compensating for adverse impacts to resources and may include, but is not limited to, fish and wildlife mitigation, cultural resources mitigation, noise mitigation, and air quality mitigation.

(1) Districts have discretion to require mitigation for a Section 408 request for a mitigated FONSI for NEPA purposes, to ensure the proposed alteration is not injurious to the public interest, or as required under other applicable federal environmental law.

(2) Mitigation associated with Section 408 requests does not need to be incrementally cost justified and does not need to comply with requirements in Section 2036 of WRDA 2007, as amended.

(3) If the proposed alteration also requires Regulatory authorization, the review conducted by the Regulatory element within the district will determine if compensatory mitigation for losses to aquatic resources is appropriate under its applicable authorities. Therefore, the Section 408 request will not include an evaluation of mitigation for those resources subject to Regulatory's jurisdiction.

i. Emergency Situations. The district has discretion to use the emergency procedures provided for in environmental statutes to process Section 408 requests.

(1) NEPA. The regulations implementing NEPA provide for flexibility in the NEPA compliance process in circumstances of an emergency after coordination with CEQ.² NEPA documentation should be accomplished prior to initiation of emergency work if time constraints render this practicable. Such documentation may also be accomplished concurrent with or after the completion of emergency work, if appropriate.³ Districts should be aware of categorical exclusions, including the categorical exclusion for emergencies at Section 1005(b) of Water Resources Reform and Development Act of 2014, to expedite NEPA compliance in these situations.

(2) Endangered Species. The regulations implementing ESA provide that where emergency circumstances mandate the need to consult in an expedited manner, consultation may be conducted informally through alternative procedures that the Service(s) determine to be consistent with the requirements of Section 7(a)-(d) of the Endangered Species Act.⁴ Formal consultation, if required, should be initiated as soon as practicable after the emergency is under control.

(3) Historic and Cultural Resources. Specific procedures to comply with Section 106 of the NHPA during a disaster or emergency are located at 36 CFR 800.12, "Emergency Situations." Districts and divisions may develop, in consultation with the Advisory Council on Historic Preservation and others, standard procedures during a disaster and/or emergency; they may follow provisions of programmatic agreements that contain specific provisions for addressing historic properties in emergencies; or, in the absence of specific procedures, provide opportunities to comment as specified in 36 CFR 800.12(b)(2).

D-4. NEPA.

a. The NEPA compliance process should be completed in an efficient, effective and timely manner consistent with guidance issued by CEQ on March 6, 2012 entitled *Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act*. Controlling guidance for NEPA compliance is set forth in CEQ's

² 40 CFR 1506.11

³ 33 CFR 230.8

⁴ 50 CFR 402.05

regulations at 40 CFR Parts 1500-1508 and the USACE Civil Works NEPA implementing regulations found at 33 CFR Part 230.

b. NEPA documentation for Section 408 requests will typically not require the same level of detailed analysis as needed for feasibility reports or other planning studies. In addition, portions of 33 CFR 230, such as Appendix A, that are applicable to feasibility, continuing authority, and/or special planning reports are not applicable to Section 408 permissions. However, districts are expected to comply with all basic requirements of NEPA.

c. Alternatives Analysis. For NEPA compliance for Section 408 requests, reasonable alternatives required by 40 CFR Part 1502.14 should focus on two scenarios: 1) no action (i.e., no proposed alteration in place) and 2) action (i.e., proposed alteration in place). Only reasonable alternatives need to be considered in detail. Reasonable alternatives must be those that are feasible, considering those that satisfy the underlying purpose and need (of the requester) that would be satisfied by the proposed federal action (granting of permission for the alteration). Thus, examination of alternative forms of a proposed alteration that the requester has not proposed should only be included to the extent necessary to allow a complete and objective evaluation of the public interest and informed decision regarding the alteration request.

(1) Because USACE is not the proponent for the alteration requested under Section 408, all environmental compliance documentation will refer to the requester's proposal as the "requester's preferred alternative."

(2) For NEPA compliance led by another entity such as another federal agency, that agency may include additional alternatives to comply with their specific requirements. District should be actively coordinating with the lead agency as a cooperating agency to ensure any information needed for NEPA compliance for the Section 408 request is included in the lead agency's NEPA document to maximize the ability to fully adopt that NEPA document.

(3) For NEPA compliance for Section 408 requests that also require Regulatory authorization, additional alternatives and additional detail may be included the NEPA document to comply with Section 404(b)(1) guidelines for the Clean Water Act (CWA). The various offices within the district should be coordinating to ensure appropriate alternatives and detail are included in any NEPA document to maximize the ability for one NEPA document to be prepared to satisfy NEPA compliance for both purposes.

(4) When Regulatory is conducting its alternatives analysis under the CWA Section 404(b)(1) guidelines, an alternative cannot be considered practicable if Section 408 permission cannot be granted. However, the need to seek a Section 408 permission does not make an alternative impracticable.

d. Public Involvement. Involving the public is a critical component to NEPA compliance. For Section 408 alteration requests that are expected to have a significant effect on the human or

natural environment, the district must make diligent efforts to involve the public throughout the NEPA scoping and EIS process including the required comment periods. For those Section 408 requests for which an environmental assessment (EA) is prepared or a categorical exclusion is used, draft NEPA compliance documents should not be circulated for public comment, except for in rare circumstances. Instead, a public notice soliciting input will serve as the method of involving the public in the NEPA process required by 40 CFR 1501.4(e)(1). See paragraph 12.b. of the main EC for information on public notices. In circumstances where a proposed alteration is associated with a current study or other uncommon circumstances, a decision to circulate the draft Section 408 EA may be approved by the Division Commander or the Division Commander's designee. Any decision to circulate draft EA and/or draft FONSI for a Section 408 request that also requires a Section 10/404/103 permit decision must be coordinated with the Regulatory Program to ensure that no pre-decisional or deliberative information related to Regulatory decision making (e.g., Section 404(b)(1) guidelines analysis) is included in the document to be circulated.

e. Categorical Exclusions. Alterations that are expected to not result in significant effects on the environment, both individually and cumulatively should be evaluated to determine if an approved categorical exclusion at 33 CFR 230.9 applies. For example, the categorical exclusions at 33 CFR 230.9(b) and (i) may have applicability to some of the smaller scale alterations that may be in a Section 408 request. Real estate grants for rights-of-way as referenced in 33 CFR 230.9(i) should be broadly interpreted to include grants of rights-of-way by either USACE or the non-federal sponsor. Prior to using a categorical exclusion, the district must ensure that the proposed alteration is within the intended scope of the specific categorical exclusion and that no extraordinary circumstances exist that would merit the preparation of an EIS or EA. Applicability and use of approved USACE categorical exclusions for Section 408 permissions should be documented in a manner consistent with the CEQ guidance memorandum titled, *Establishing, Applying and Revising Categorical Exclusions under the National Environmental Policy Act*, dated 23 November 2010.

f. Adoption and Incorporation by Reference. Districts are strongly encouraged to adopt and/or incorporate by reference any NEPA documentation that may already exist or may already be in development for the federal project, or other relevant NEPA documentation. This may include recent NEPA documents from a feasibility study, operations study, dam safety modification study, and/or Regulatory actions. Districts must ensure that the information contained in these other NEPA documents is appropriate and applicable to the anticipated effects of the alteration, paying particular attention to re-evaluate information that is greater than 5 years old, prior to adoption or incorporation by reference for the Section 408 permission decision. Districts should provide supplemental NEPA documentation, to only cover those environmental impacts associated with the Section 408 alteration that were not considered in these previous NEPA documents. Districts may also adopt another agency's EA. When adopting all or portions of another agency's EIS or EA, the district is still responsible for developing a Record of Decision (ROD) or FONSI, as applicable, to document NEPA compliance for the Section 408

permission decision. The ROD or FONSI may be integrated with the Summary of Findings for purposes of efficiency.

g. Cooperating Agencies.

(1) As provided for in 40 CFR 1501.6, upon request of another federal agency that is the lead agency for NEPA, any other federal agency that has jurisdiction by law shall be a cooperating agency. This may include USACE when a Section 408 permission is required. For those alterations in which another Federal agency is the NEPA lead agency, districts will participate in the NEPA review as a cooperating agency to the maximum extent practicable.⁵ When USACE is a cooperating agency, USACE will provide comments on another federal agency's draft EIS even if the response is no comment.⁶ Districts will normally adopt that federal agency's EIS and consider it to be adequate for NEPA compliance for a Section 408 permission unless the district finds substantial doubt as to the technical or procedural adequacy or omission of factors important to the Section 408 permission decision,⁷ particularly those that were raised by USACE during the development of the EA or EIS but rejected by the lead agency for inclusion. Districts may also adopt portions of an EIS under 40 CFR 1506.3, and supplement with any information necessary to comply with NEPA for the Section 408 permission decision. For hydropower alterations, USACE and FERC have entered into an MOU for meeting NEPA requirements (see Appendix F).

(2) Tribal governments may have special expertise with respect to alternatives and can participate as a cooperating agency. Meaningful coordination with tribal entities, and analysis of a proposed action's potential effect on tribal lands, resources, or areas of historic significance is an important part of federal agency decision-making. In addition to provisions in 40 CFR 1501.2 and 1501.7 which call for the involvement of tribes that may be affected by a federal proposal, CEQ issued a Memorandum to the Heads of Federal agencies (July 28, 1999) encouraging more active solicitation of tribal entities for participation as cooperating agencies in NEPA documents. Per the CEQ Memorandum, the benefits of granting cooperating agency status include "disclosure of relevant information early in the analytical process, receipt of technical expertise" which is consistent with the USACE tribal consultation policy.

h. Multi-phase Reviews and Tiering. Districts have discretion to use tiering to efficiently conduct NEPA compliance for a multi-phased review of a Section 408 request. In this case, a broad or programmatic EIS or EA, as appropriate, would be completed in the first milestone of a multi-phased review of a Section 408 request. The district may then supplement, or tier off of, the original NEPA document, as appropriate, for each subsequent milestone of the Section 408 request. When tiering, the initial broad or programmatic EIS or EA must present sufficient information regarding overall impacts of the proposed alteration so that decision-makers can make a reasoned judgment on the merits of the action at the present stage of planning or

⁵ 33 USC 408(b)(1)(B)

⁶ 33 CFR 230.19(e)

⁷ 33 CFR 230.21

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development and exclude from consideration issues already decided or not ready for decision. The initial broad EIS or EA should also identify data gaps and discuss future plans to supplement the data and prepare and circulate phase-specific NEPA documents.⁸

⁸ 33 CFR 230.13(c)

APPENDIX E

Dams and Levees

E-1. Purpose. The purpose of this appendix is to provide supplemental guidance to be used in conjunction with guidance in the main EC for proposed alterations by others to federally authorized dams and reservoirs, (including dams associated with navigation locks) and levee systems.

E-2. Applicability.

a. Dams and Reservoirs (including Navigation Dams). A dam is an artificial barrier, usually crossing a watercourse and including appurtenant structures, constructed for the purpose of storage, control, or diversion of water. This definition applies whether the dam has a permanent reservoir or is a detention dam for temporary storage of floodwaters. This appendix is applicable to federally authorized dams, and associated appurtenant structures, operated and maintained by USACE or those constructed by USACE, but which are operated and maintained by non-federal sponsors and may also be included under the jurisdiction of a State Dam Safety Agency defined by the National Dam Safety Program. This appendix may also be applicable to lands required to ensure reservoir integrity up to the project maximum flood (PMF), in addition to structures and canals where breach would release pool. See Appendix F for additional information concerning hydropower facilities. Below further describes applicability related to water supply at USACE dams and reservoirs.

(1) Water supply users entering into an agreement under Section 6 of the Flood Control Act (FCA) of 1944 (33 USC 708) or the Water Supply Act (WSA) of 1958, as amended (43 USC 390b) generally will not need a separate Section 408 permission.

(2) For currently authorized Municipal and Industrial (M&I) water supply storage, Section 408 considerations will be taken into account in the drafting of an M&I water storage agreement and associated outgrants or consents. Any requirements related to the user's facilities (intake structures, etc.) will be included in the agreement and related outgrants or consents.

(3) For reallocated M&I water supply storage under the 1958 WSA authority, the water supply user must be advised that the reallocation study itself will not specifically address the Section 408 considerations but that Section 408 considerations will be taken into account in the drafting of a water storage agreement and associated outgrants or consents. Any requirements for water supply user's facilities (intake structures, etc.) will be included in the agreement and associated outgrants or consents.

(4) For surplus water under the authority of Section 6 of the 1944 FCA, Section 408 considerations will be taken into account in the drafting of the surplus water agreement and

associated outgrants or consents and any requirements for water supply user's facilities (intake structures, etc.) will be included in the agreement and associated outgrants or consents.

(5) For M&I water supply intakes of any size to be placed in USACE-operated projects that do not fall within the scope of either Section 6 of the 1944 FCA or of the 1958 WSA, e.g., intakes placed at projects not meeting the definition of "reservoir" projects for purposes of those two statutes, the guidance in paragraph 9.e. must be followed to determine if a separate Section 408 permission is required.

b. **Levee Systems.** A levee system (or sometimes referred to as "levee" in this document), is comprised of one or more components which collectively provide flood risk reduction to a defined area, referred to as a leveed area. A levee is inclusive of all components that are interconnected and necessary to exclude floods from the leveed area. Levees do not usually cross a watercourse. Common components and associated features for levee systems include sheetpile walls, berms, relief wells, cutoff walls, foundation, drainage structures, ponding areas, channels, closure structures, pump stations, transitions, and erosion protection. This appendix applies to federally authorized levee systems including those operated and/or maintained by USACE and those federally authorized levee systems operated and maintained by a non-federal sponsor.

E-3. References. The following is a list of references containing evaluation processes, design standards, and operations and maintenance procedures that may be relevant to consider for alterations to dams and levees.

- a. Section 6 of the Flood Control Act (FCA) of 1944 (P.L. 78-534), Contracts for safe of surplus water at Army projects – Disposition of revenues
- b. Water Supply Act (WSA) of 1958 (P.L. 85-500, as amended)
- c. 44 CFR 65.10, Mapping of areas protected by levee systems
- d. ER 1110-2-1150, Engineering and Design for Civil Works Projects
- e. ER 1110-2-1156, Safety of Dams, Policy, and Procedures
- f. ER 1110-2-1806, Earthquake Design and Evaluation of Civil Works Projects
- g. ER 1110-2-1942, Inspection, Monitoring, and Maintenance of Relief Wells
- h. EM 1110-1-1005, Control and Topographic Surveying
- i. EM 1110-1-1804, Geotechnical Investigations

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- j. EM 1110-1-1904, Settlement Analysis
- k. EM 1110-1-2908, Rock Foundations
- l. EM 1110-2-1418, Channel Stability Assessment for Flood Control Projects
- m. EM 1110-2-1601, Hydraulic Design of Flood Control Channels
- n. EM 1110-2-1902, Slope Stability
- o. EM 1110-2-1906, Laboratory Soils Testing
- p. EM 1110-2-1913, Design and Construction of Levees
- q. EM 1110-2-1914, Design, Construction, and Maintenance of Relief Wells
- r. EM 1110-2-2002, Evaluation and Repair of Concrete Structures
- s. EM 1110-2-2007, Structural Design of Concrete-Lined Flood Control Channels
- t. EM 1110-2-2100, Stability Analysis of Concrete Structures
- u. EM 1110-2-2104, Strength Design for Reinforced-Concrete Hydraulic Structures
- v. EM 1110-2-2200, Gravity Dam Design
- w. EM 1110-2-2502, Retaining and Flood Walls
- x. EM 1110-2-2504, Sheet Pile Walls
- y. EM 1110-2-2902, Conduits, Culverts, and Pipes
- z. EC 1110-2-6066, Design of I-Wall
- aa. ETL 1110-2-583, Engineering and Design: Guidelines for Landscape Planting and Vegetation Management at Levees, Floodwalls, Embankment Dams, and Appurtenant Structures
- bb. ETL 1110-2-575, Evaluation of I-Walls
- cc. U.S. Army Corps of Engineers, Policy for Development and Implementation of System-Wide Improvement Frameworks (SWIFs), CECW-HS memorandum, 29 November 2011

dd. U.S. Department of Interior Bureau of Reclamation and US Army Corps of Engineers, Best Practices in Dam and Levee Safety Risk Analysis, 1 July 2015 (or most recent version)

ee. See Appendix A for other applicable references.

E-4. Coordination.

a. For levee alterations, ensure involvement of the district Levee Safety Officer (LSO) and Levee Safety Program Manager (LSPM). For dam and reservoir alterations, ensure involvement of the district Dam Safety Officer (DSO) and Dam Safety Program Manager (DSPM). In addition, the district should inform the requester of any current USACE assessments, modifications, or other studies that are ongoing or are being considered that may have compatible objectives with the potential proposed alteration. These may include semi-quantitative or quantitative risk assessments, dam safety modification studies, interim risk reduction measures, or cost-shared studies.

b. Coordination with State Dam Safety Agencies. When the request is for the alteration of a dam operated by a non-federal sponsor, the alteration will be reviewed by the State Dam Safety Agency. In these cases, the requester must obtain written concurrence of the proposed alteration from the State Dam Safety Agency prior to USACE issuing the final Section 408 decision.

c. DSOG/LSOG Review. If the district determines a Safety Assurance Review (SAR) is required for a proposed alteration to a dam or levee, the RMC will determine if the Dam Senior Oversight Group (DSOG) or Levee Senior Oversight Group (LSOG) will review the proposed alteration. If it is determined that the DSOG or LSOG review is required, the RMC will inform the division and district and it will be documented in the review plan. If the DSOG review is required, the district should contact the HQUSACE DSPM to schedule a briefing with the DSOG as soon as possible. If the LSOG review is required, the district should contact the HQUSACE LSPM to schedule a briefing with the LSOG as soon as possible. Information to be presented should include available risk assessment (screening-level or higher-level risk assessments) information and a description of the proposed alteration. DSOG or LSOG will provide feedback, recommendations and concurrence or non-concurrence with proceeding with the Section 408 to the division and district safety officers. The DSOG or LSOG will consider the following when reviewing the Section 408 proposed alteration:

(1) whether the benefits of the alteration are generally commensurate with the risks

(2) whether the alteration potentially worsens or creates new failure modes or risk drivers for the USACE project; and

(3) whether the alteration is exceptionally complex or high risk.

E-5. Potential Considerations for Section 408 Submittals. The information below supplements the main EC. The list below is only a guide for information and/or analyses that may be needed to review alterations to dams and levees. It is not intended to list every analysis or design consideration that may be needed for all proposals.

a. Risk Assessment. Depending on the complexity and associated impacts of the proposed alternation on life safety as determined by the district DSO or LSO, the requester may be required to provide a risk assessment showing risk estimates associated potential failure modes with and without the proposed alteration in place. The district must also inform the requester if there is a change in the risk characterization of the dam or levee during the Section 408 review process and how or if the change in risk will require changes to the alteration being requested.

b. Discussion of Executive Order 11988 Considerations. The district may require the requester to submit sufficient data in order that the district may conduct its analysis required by reference A.35 to ensure that the proposed alteration is compliant with Executive Order (EO)11988. The request should be assessed as to whether there would be induced development in the floodplain, as defined in A.35, as a result of the proposed alteration and address the positive and negative impacts to the natural floodplain functions.

c. Civil. Each request should clearly identify the existing condition of the portion of the USACE project being altered and include plan, profile, and design details of the proposed alteration in relation to the existing USACE project. Below are examples of information that may be necessary to understand the existing and proposed conditions:

(1) Alteration location (Vicinity map and specific alteration location in station or river mile and/or decimal degrees)

(2) Applicable datum

(3) Real property, existing and to be acquired, needed for the proposed alteration

(4) Grading plans

(5) Layout plan, profiles, and cross-sections of proposed alteration

(6) Previous inspection reports to assist in identifying existing deficiencies and their proximity to the proposed alteration.

(7) Temporary measures required during construction (bypasses, cofferdams, etc.)

d. Geotechnical. The following is a list of analyses or information that may be necessary to consider for geotechnical considerations and assessing their impacts if proposed alterations alter the USACE project cross-section or penetrate the natural blanket or foundation.

- (1) Erosion control (changes in erosive forces on a slope)
- (2) Material usage/borrow/waste/transport/hauling
- (3) Liquefaction susceptibility
- (4) Placement of stockpiles, heavy equipment, or other surcharges
- (5) Drilling plan, reference A.31
- (5) Results of subsurface investigation – boring logs, test pit logs, laboratory test results, etc.
- (6) Seepage analysis
- (7) Settlement analysis
- (8) Stability analysis
- (9) Vegetation

e. Structural. The following is a list of analyses or information that may be necessary to evaluate the impacts of proposed alterations to concrete, floodwalls, or drainage structures:

- (1) Bridges and related abutments
- (2) Design analysis for retaining walls and excavation support system
- (3) Design of shallow or deep foundations, including bearing capacity and settlement analysis if the construction is located within the line of protection or right-of-way and creates potential seepage problems
- (4) Design recommendations for foundations on expansive soils
- (5) Diaphragm walls
- (6) Gates or other operable features
- (7) Other structural components integral to the USACE project

(8) Pier penetrations of embankments

(9) Stability analysis including sliding, overturning, bearing, flotation, uplift and any seismic load effects for any alteration to the channel walls and/or flood walls

(10) Structural drainage control methods

(11) Water stops and contraction/expansion joints

f. Hydrology and Hydraulics. Refer to Appendix H for details on when and how a hydrology and hydraulic system analysis should be conducted. Refer to the list below for examples of factors that should be considered when evaluating hydrology and hydraulics impacts.

(1) Changes in inflow

(2) Changes in velocity

(3) Changes in water surface profiles and flow distribution

(4) Consideration of impacts to energy dissipation measures; hydropower generation; sedimentation; or navigation

(5) Scour analysis

(6) Sediment transport analysis

g. Water Control Management Plan. Alterations may have impacts on how water control structures are operated. In these cases, the alterations should consider any impacts or changes to water control plans that may be necessary. If a change to a water control manual is required, the NEPA document developed for the Section 408 alteration should incorporate appropriate analysis for updating the water control manual. Alterations that will work in conjunction with an existing Federal Water Control Manual (WCM) should be documented and incorporated into that WCM. Items to be considered are:

(1) Effects on existing Biological Opinions, Water Quality Certifications, Coastal Zone Management Concurrences, etc. should evaluate project impacts on any legal document, agreement, or requirement that informs water control management by the USACE

(2) Impacts/revisions to the operation of USACE facilities or other projects within the basin

h. Operations, Maintenance and Flood Fighting. Alterations may change how a dam, levee, floodwall, or channel project is to be operated or maintained. They may also require special

flood fighting procedures. Reviews should consider the factors below to determine potential effects.

- (1) Project and maintenance access
- (2) Special inspection requirements
- (3) Maintenance practices
- (4) Flood fighting requirements and practices

(5) Flood contingency plan during construction, measures proposed to protect area under construction, monitoring of river level, river stage at which plan will be activated, materials and equipment to be used to activate plan, and personnel contact and telephone number to activate plan

E-6. USACE Review Considerations.

a. The district (and division, if applicable) LSO is required to review any Section 408 request that modifies a levee system. The district (and division, if applicable) DSO is required to review any Section 408 request that modifies a dam.

b. Risk. Districts will consider the effects of the proposed alteration on the risk associated with the USACE project as part of the review process.

c. National Flood Insurance Program (NFIP). The criteria related to NFIP mapping purposes (44 CFR 65.10, Mapping of areas protected by levee systems) are not USACE design standards and should not be a consideration in the technical analysis or design review. However, the impacts associated with mapping dams and levee systems for the NFIP, such as influences on floodplain management, should be discussed as part of compliance with EO 11988 and considered when discussing potential impacts to associated risks. For Section 408 requests that include an objective of achieving levee accreditation for the NFIP, if the Section 408 is approved, a statement in the written approval document will specify that approval does not constitute, nor should it be construed as, an evaluation to determine if NFIP criteria have been met.

d. Rehabilitation Program. Proposed alterations to federally authorized dams, levees, and floodwalls must also be evaluated to determine whether the alteration will become an integral component of the USACE project. If it is determined that the proposed alteration will become an integral component of the USACE project that is necessary for proper functioning of the USACE project for its authorized purpose, the completed alteration will be included as a USACE project feature eligible for rehabilitation assistance and treated as a federal project component under PL 84-99. The district is responsible for making a determination as to whether or not a proposed

alteration will become an integral component of the USACE project. Factors to consider will vary depending on the type of infrastructure and the proposed alteration. This determination must be made for all proposed alterations to federally authorized dams and levees, regardless of their status in the Rehabilitation Program at the time of the Section 408 request, to ensure that the proposed alteration is appropriately considered in future decisions about project eligibility for rehabilitation assistance. Examples of such alterations include stability or seepage berms, and changes to the structure type or geometry. In addition, districts should identify if the alteration is part of an approved System Wide Improvement Framework (SWIF), see reference E-3.bb, and consider any information specified for the alteration in the SWIF. For more information on USACE emergency activities and the Rehabilitation Program, see reference A.29.

e. Alterations Within the Reservoir Area. These proposed alterations require the same level of technical review as alterations to dams. Generally, alterations within the reservoir areas will be requested by the water supply non-federal sponsor for intake facilities. These alterations should be reviewed for impacts to life safety, inundation, and intake levels. When reviewing the intake levels, consideration will be given to drought conditions and also to lake level drawdowns for dam safety water control purposes. When alterations are proposed along the reservoir, the alteration will be reviewed for constructability and for potential failure modes related to misoperation, overtopping, foundation failures, alteration-induced subsidence, and other possible incidents that could cause the uncontrolled loss of pool.

E-7. Post-Permission Oversight.

a. Inspections. Inspections conducted by USACE should document whether approved alterations are being operated and maintained consistent with the approved Section 408 and/or updated O&M manual.

b. National Levee Database (NLD). Districts should ensure that the NLD is updated to capture new or changed features of a levee system constructed as part of a Section 408 permission. The district will provide the requester with the requirements for any needed surveys, including updated centerline information and cross sections, in order to update the project information in the NLD to capture the alterations.

c. National Inventory of Dams (NID). Districts should ensure that the NID is updated to capture new or changed features of a dam, including appurtenant structures, constructed as part of a Section 408 permission. The district will provide the requester with the requirements to update the project information in the NID to capture the alterations.

APPENDIX F

Non-federal Hydropower Development at USACE Facilities

F-1. Purpose. The purpose of this appendix is to provide supplemental guidance to be used in conjunction with guidance in the main EC and Appendix E for requests for alterations of USACE projects by adding hydroelectric power generation and requiring a preliminary permit or license by the Federal Energy Regulatory Commission (FERC). In these cases, the main EC, this appendix, and the current Memorandum of Understanding (MOU) between the FERC and USACE, reference F-2.h (or most current version), will govern the Section 408 review process. The MOU contains the process to be used for the environmental and cultural resources compliance where FERC is the lead federal agency and USACE would be a cooperating agency. USACE is responsible for developing an understanding of the concept proposal and for responding to FERC inquiries regarding jurisdiction and conflict with USACE project purposes. USACE will also share, as appropriate, information regarding risks to the USACE project.

F-2. References.

- a. Federal Power Act, as amended
- b. ER 1110-2-401, Operation, Maintenance, Repair, Replacement, and Rehabilitation Manual for Projects and Separable Elements Managed by Project Sponsors
- c. ER 1110-2-1150, Engineering and Design for Civil Works Projects
- d. ER 1110-2-1454, Corps Responsibilities for Non-Federal Hydroelectric Power Development under the Federal Power Act
- e. ER 1110-2-1462, Water Quality and Water Control Considerations for Non-Federal Hydropower Development at Corps of Engineers Projects
- f. ECB 2008-8, Sharing Technical Information in Support of Non-Federal Hydropower Development
- g. US Army Corps of Engineers, Charging and Retaining Fees Charged to FERC Licensees, CECC-G memorandum, 6 June 2006
- h. Memorandum of Understanding Between the United States Army Corps of Engineers and the Federal Energy Regulatory Commission on Non-Federal Hydropower Projects, 20 July 2016, with attachments.
- i. See Appendix A of this EC for other applicable references.

F-3. USACE and FERC Coordination.

a. Under the default two-phase process established under reference F-2.h, USACE and FERC have agreed to work with each other and with other participating agencies or entities, as appropriate, to ensure that timely decisions are made and that the responsibilities of each agency are met. Specifically, subject to the availability of resources and consistent with applicable laws, regulations, Army policies and FERC policies, each agency agrees to: commit to early involvement; participate proactively; share data; communicate informally; attend public meetings; and coordinate on studies of hydropower potential.

b. Each district and division that operates non-powered dams or other facilities with the potential for generating hydroelectric power has a FERC Coordinator for coordination with FERC regarding the licensing process and all aspects of non-federal hydropower development on a USACE dam or facility. The FERC Coordinator will be responsible for working with the Section 408 Coordinator to ensure timely completion of the Section 408 review process consistent with reference F-2.h. The FERC Coordinator should also ensure coordination occurs with Regulatory, as appropriate.

c. When a USACE district receives a written request to alter a USACE project for the addition of hydroelectric generation, the district will confirm that the requester has applied or intends to apply for a FERC preliminary permit to investigate the potential for adding hydroelectric power facilities to the USACE project. Initial coordination should consist of a meeting to discuss the proposed project and inform the requester of any known issues that would impact their proposal, such as any dam safety or water supply issues.

d. For projects with an existing FERC permit or license, reference F-2.h should be utilized to the greatest extent possible.

e. USACE will seek to streamline processes to the maximum extent possible, such as through programmatic approaches or adoption of reviews conducted by others (Appendix D) or use of categorical permissions as described in Appendix C.

f. The public notice requirements for non-federal hydropower Section 408 requests must be closely coordinated with FERC's public notice requirements for the licensing process, and where feasible the FERC public notice process must be relied upon if sufficient to reduce redundancy.

g. Design documentation within the FERC license application Exhibit F generally satisfies the design and information requirements for environmental reviews for phase I when addressing non-federal hydropower proposals.

h. Where FERC license requirements are duplicative with Section 408 permission requirements in the EC, if feasible, the FERC requirements must be relied upon to inform the

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USACE Section 408 permission and other related USACE decisions as encouraged by reference F-2.h to ensure streamlining and reduction of duplicative efforts.

i. Phase II of reference F-2.h allows for requesters to employ either the single-phased or multi-phased Section 408 process, as best suits the technical nature of the proposed project.

APPENDIX G

Navigation Channels, Harbors, Locks, Jetties, Bridges, and Features

G-1. Purpose. The purpose of this appendix is to provide supplemental information to be used in conjunction with guidance in the main EC for alterations proposed by others to USACE navigation projects, including channels, harbors, locks, jetties, bridges, and other associated features (upland dredged material containment facilities). The mission of the USACE navigation program is to provide safe, reliable, efficient, effective, and environmentally sustainable waterborne transportation systems for movement of commerce, national security needs, and recreation. This mission is accomplished by ensuring adequate project dimensions to provide safe passage of commercial navigation through the federally authorized navigation project, while minimizing environmental impacts. Accordingly, any proposed alterations to an authorized USACE navigation project must be evaluated to determine that such alteration will not impair the usefulness of the project and will not be injurious to the public interest. Refer to Appendix E for proposed alterations to navigation dams.

G-2. References. The following is a list of references that may be relevant to consider for alterations to navigation features.

- a. Section 204 of Water Resources Development Act of 1986, Public Law (PL) 99-662
- b. 33 USC 565, River and Harbor Improvement by Private or Municipal Enterprise
- c. ER 1110-2-1403, Studies by Coastal, Hydraulic, and Hydrologic Facilities and Others
- d. ER 1110-2-1404, Hydraulic Design of Deep Draft Navigation Projects
- e. ER 1130-2-520, Navigation and Dredging Operations and Maintenance Policies
- f. ER 1140-1-211, Non-Department of Defense Reimbursable Services
- g. ER 1165-2-211, Water Resource Policies and Authorities – Operation and Maintenance of Improvements Carried Out By Non-Federal Interests to Authorized Harbor or Inland Harbor Projects
- h. EM 1110-2-1611, Layout and Design of Shallow-Draft Waterways
- i. EM 1110-2-1613, Hydraulic Design of Deep Draft Navigation Projects
- j. EP 1130-2-520, Navigation and Dredging Operations and Maintenance Guidance and Procedures

k. COMDTPUB P16591.3D, Office of Bridge Programs, U.S. Coast Guard Bridge Permit Application Guide, July 2016

l. See Appendix A for other applicable references.

G-3. Project Specific Setbacks. Once it has been determined that Section 408 permission is required, districts are encouraged to use any project-specific setbacks as a guideline in evaluating whether a structure or activity is at a sufficient distance from the USACE project so not to impact the usefulness of the USACE navigation project. For those USACE navigation projects that do not have established setbacks, districts may elect to establish setbacks to delineate the minimum distances a structure or feature should be located from a navigation feature (adjacent, over, and/or below) to avoid impacting the usefulness of the project. Districts may consider project specific setbacks as a criterion when establishing a categorical permission. At a minimum, the following should be considered when developing setbacks:

- a. Maximum dredging depth and width, to include advanced maintenance, allowable over-depth, and non-pay overdepth
- b. Top edge of the navigation channel, including appropriate side slopes and overdepth
- c. Sufficient clearances of equipment needed for dredging the navigation channel to its full depth and width, including side slopes
- d. Minimum low sag clearance required for lines or structures crossing above the channel
- e. Weather, tides, flow rates, velocities, and other factors related to the region
- f. Dredged Material Placement Facility availability

G-4. Proposed Alterations in which the Scope of Analysis Completely Aligns Between Section 10 and Section 14 (33 USC 408) of the Rivers and Harbors Act of 1899. Activities proposed in, over, or under navigable waters within a USACE Navigation project typically require authorization under both Section 10 and Section 408. The scope of what USACE must evaluate to make a decision under each authority will be different for many activities due to the different nature of the jurisdiction of each authority. The scope of analysis for Section 10 is generally limited to jurisdictional waters (see 33 CFR Part 325 Appendix B Paragraph 7.b.), whereas the scope of analysis for Section 408 is defined in relation to the limits of the Civil Works project and can include operations and maintenance and/or emergency response considerations to the extent those activities have an effect on the USACE project. In cases in which there are different scopes of analysis for Section 10 and Section 408, USACE will issue separate authorizations under each authority after sharing and leveraging information and analysis to the maximum extent practicable. However, for many activities altering navigation projects, the scope of analysis for Section 10 and Section 408 will be identical. In those cases where the scope of analysis for

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Section 10 and Section 408 is identical, a single authorization will be issued following the following procedures.

a. The district will use information provided by the applicant/requester for activities occurring within navigable waters and within the boundaries of a USACE Navigation project and make a determination as to whether or not the scope and information needs would be the same for both a Section 10 and Section 408 decision. The typical type of proposed activities within USACE Navigation projects in which it may be likely that the jurisdiction and scope would be the same for both Section 10 and Section 408 include proposals for electric transmission lines, boat docks, boat lifts, bulkheads, revetments, minor dredging, mooring buoys, mooring pilings, and other similar activities. In cases when the scope and jurisdiction of Section 10 and Section 408 do not completely align, separate authorizations under Section 10 and Section 408 are required. In addition, proposed activities that also would require authorization under Section 404 of the Clean Water Act outside the boundary of the activity that triggers Section 10 jurisdiction will require a separate Section 408 permission if one is needed. Districts should coordinate with the appropriate Regulatory office and Section 408 staff for clarification on jurisdiction.

b. For cases in which the scope and jurisdiction between Section 10 and Section 408 align, appropriate district staff for Regulatory will review the information submitted for the purposes of environmental compliance and the public interest review. Appropriate district staff for the USACE Navigation project will review the information for the purposes of determining impacts to the usefulness of the USACE Navigation project (e.g., compare the proposal to approved setback policies and/or overdepths). The district will ensure there is coordination between the Regulatory and Navigation staff in cases in which additional information may be needed from the requester to promote efficiency and reduce the burden on the requester.

c. The district staff evaluating impacts to the usefulness of the USACE Navigation project will document their findings in a Memorandum for Record (MFR) that will be provided to the district Regulatory staff for their use in the Section 10 permit evaluation and determination. The MFR will contain the rationale and basis for the impacts to the usefulness determination of the proposed activity on the USACE Navigation project, including any conditions that the applicant would be required to adhere to in order to ensure the continuance of no impacts to the usefulness of the USACE Navigation project. A determination that the alteration will not impair the usefulness of the project satisfies the requirement to ensure that the alteration is “compatible” with the purposes of the project set forth at 33 CFR 320.4(g)(5). Funding for district staff for the impact to the usefulness of the project determination and development of the MFR should come from project appropriated funds associated with the specific USACE Navigation project. Regulatory funds cannot be used for the development of the MFR. The USACE Navigation office is responsible for determining that the conditions in the MFR are enforceable and for enforcing such conditions in the Section 10 permit.

d. If the Section 10 authorization is approved, the Regulatory staff will ensure that any conditions specified in the MFR are included as conditions in the Section 10 permit document.

Note, the required standard terms and conditions in Appendix K will be the minimum conditions that will need to be included in the MFR and incorporated into the Section 10 permit. Also, Regulatory staff must include in the Section 10 permit document that is provided to the applicant the following statement: “It has been determined that the activities authorized do not impair the usefulness of the USACE Navigation project and is not injurious to the public interest.”

G-5. Construction or Modification of Bridges over USACE Navigation Projects.

a. Federal law prohibits the construction of bridges over navigable waters of the United States unless first authorized by the U.S. Coast Guard (USCG) under one of its authorities within Title 33 of the U.S. Code, including Section 9 of the Rivers and Harbors Act of 1899. As part of its permit review process, the USCG will evaluate whether the construction or modification of a bridge will obstruct commercial and recreational navigation within the waterway. For bridges that cross a USACE navigation channel, the USCG bridge permit decision will be informed by USACE’s determination under Section 408 whether the bridge will impact the usefulness of the navigation project.

b. In order to minimize duplication of effort among USACE and USCG’s authorities, USACE districts should coordinate closely with the appropriate USCG personnel throughout the respective reviews, including issuance of concurrent or joint public notices (see paragraph 12.b) when feasible, and sharing information when a Navigation Impact Analysis is required for the USCG bridge permit review. USACE districts may use information provided to USCG as part of the bridge permit application package (see reference G-2.k.) to satisfy the basic requirements of a complete Section 408 request. When additional information is required from the requester to evaluate the Section 408 request, USACE districts should coordinate with the USCG to align, and not duplicate, those information needs.

c. For environmental compliance for bridges crossing USACE navigation channel, there is often another federal agency other than USACE or USCG that is the federal lead agency (such as the Federal Highway Administration). In those situations, USACE will assume a cooperating agency role as indicated in paragraph D-4.g. For situations in which either USCG or USACE is the lead agency, USACE and USCG will coordinate to conduct joint environmental compliance to the extent allowable, including the preparation of one NEPA document to inform both the USCG permit decision and the USACE Section 408 permission decision.

APPENDIX H

Hydrologic and Hydraulic System Analysis

H-1. Purpose. This appendix is intended to outline the requirements for a hydrologic and hydraulic (H&H) system analysis as referenced in paragraph 11.c.(2) of the main EC. The purpose of an H&H system analysis is to determine the potential hydrologic and hydraulic changes resulting from proposed Section 408 alterations. In general, these procedures focus on riverine situations, but analysis requirements can be tailored appropriately for interior systems, navigation systems, and coastal situations. Districts will determine whether an H&H system analysis is needed and, if so, the appropriate scope of analysis based on the complexity of the proposed alteration. The requester will be responsible for the analysis. This appendix describes how to perform an analysis and display the results when it has been determined that an H&H analysis is required.

H-2. References.

- a. ER 1105-2-101, Risk Analysis for Flood Damage Reduction Studies.
- b. EM 1110-2-1619, Risk-Based Analysis for Flood Damage Reduction Studies.
- c. U.S. Army Corps of Engineers (USACE) Hydrologic Engineering Center (HEC), Hydrologic Modeling System HEC-HMS User's Manual, CPD-74A, Hydrologic Engineering Center, Davis, CA.
- d. U.S. Army Corps of Engineers (USACE) Hydrologic Engineering Center (HEC), HEC-RAS River Analysis System User's Manual, CPD-68, Hydrologic Engineering Center, Davis, CA.
- e. U.S. Army Corps of Engineers (USACE) Hydrologic Engineering Center (HEC), *HEC-ResSim Reservoir System Simulation, User's Manual*, CPD-82, Hydrologic Engineering Center, Davis, CA.
- f. U.S. Army Corps of Engineers (USACE) Hydrologic Engineering Center (HEC), *HEC-FDA Flood Damage Reduction Analysis, User's Manual*, CPD-72, Hydrologic Engineering Center, Davis, CA.
- g. U.S. Army Corps of Engineers (USACE) Hydrologic Engineering Center (HEC), *HEC-WAT Watershed Analysis Tool, User's Manual*, CPD-88, Hydrologic Engineering Center, Davis, CA.

H-3. Basic Requirements and Assumptions.

a. For the purposes of this appendix, the word “system” is an integrated combination of features, property, and environment that are influenced by the proposed alteration due to changes in the frequency, depth, duration, or extent of flooding. This includes hydrologic and hydraulic connections upstream, downstream, within a navigation system, or along the coast.

b. H&H system analyses will be applied to proposed alterations of federally authorized USACE projects that change the hydrologic and/or hydraulic conditions (e.g., changing the location or dimensions of levees or channels, changing reservoir operations, constructing bridges or roadways, etc.). Districts will determine the appropriate scope of the H&H analysis based on the complexity of the proposed alteration.

c. The H&H system analysis will consider flood events and hydraulic loading only. Infrastructure measures (dams, levee and floodwall systems, jetties, and channels) will be assumed to be stable and functional up to the top of containment, and no breaching will be assumed. Based on this assumption, system response curves are not required. Other factors such as changes in performance and consequences due to the H&H changes identified by this analysis will be determined based on other information and analyses beyond this H&H system analysis. All factors and information will be considered comprehensively to make the final Section 408 decision.

d. The hydraulic analysis will consider the full range of hydrologic loading conditions.

e. For loading conditions where flood waters exceed the system capacity, the analysis must include overtopping.

f. System impacts will be determined by comparing H&H results for the existing, authorized purpose, and with proposed alteration conditions. The district should try to identify and ensure that the analysis considers the effects of reasonably foreseeable and known future alterations and/or projects throughout the system in conjunction with the proposed alteration.

H-4. Evaluation Metrics. Results of the H&H system analysis must be presented in a way to assist the Section 408 decision-makers in understanding the impacts (i.e., consequences) of the H&H changes as a result of the proposed alteration. Results can be evaluated using either changes in median or expected values of various hydrologic and hydraulic parameters, or changes in assurance (i.e., uncertainty) about those values. To improve the understanding of the H&H changes of the proposed alteration, floodplain inundation maps showing flood depths and extent should be provided. The following are various H&H outputs that may be useful to display and determine H&H changes. Specific requirements will vary depending on the particular project and proposed modification.

a. Changes in water surface elevation.

- b. Changes in Annual Exceedance Probability (AEP), where AEP is defined as the likelihood of a target water surface elevation being exceeded in any given year, based on the full range of possible flood events.
- c. Changes in flow, velocity, frequency, and duration.
- d. Changes in flood depth and flooding extent displayed on inundation maps.

H-5. Process.

a. The H&H system analysis will assess changes at the proposed alteration site and at all locations reasonably considered to be affected by the proposed alteration. The procedures described in this appendix are, in general, appropriate, with some adaptation to reflect the effects of hydraulic connectivity. Pre-approved software for analyses can be used, which include HEC-HMS (Ref. H-2.c), HEC-RAS (Ref. H-2.d), HEC-ResSim (Ref. H-2.e), HEC-FDA (Ref. H-2.f) and HEC-WAT (Ref. H-2.g). Use of any other software must be approved prior to application.

b. Methods for performing the H&H system analysis are flexible. One possible approach is described here, and follows the procedures outlined in EM 1110-2-1619 (Ref. H-2b).

(1) Step 1: Define the spatial extent of the system for which potential hydrologic and hydraulic changes must be assessed and select index locations within that extent for the H&H system analysis.

(a) The extent of the hydraulically interconnected system must be defined as the first step in an H&H system analysis. This extent must be broad enough to include channel reaches and floodplains downstream and upstream of the proposed alteration site that a reasonable analyst would expect to be influenced by changes in discharge or corresponding water surface elevation at the proposed alteration site. Within that extent, impact areas should be identified and index locations selected to allow assessment and reporting of changes. If initial findings show significant change at the outer extents represented by the selection of index locations, additional index points may be required out to the locations showing no change. Guidance for identifying impact areas and selecting index locations is included in the user's manual for the HEC-FDA (Ref. H-2.f) software and in EM 1110-2-1619 (Ref. H-2.b).

(b) Review of hydraulic model results will aid in determining the appropriate extent. For example, examination of computed water surface profiles will identify locations upstream or downstream of a proposed alteration site at which changes in the geometry at the site will have an impact on water surface elevations. Care must be exercised and results scrutinized to judge if changes in computed elevations are logically related to the changes in the geometry, or if changes seen in the model results are artifacts of computational precision limits or model instabilities. In some cases, downstream flows at a confluence will increase for a proposed

alteration, but the increase will be due to a change in timing between contributing hydrographs. Consideration should be given to whether the change in timing would be expected to be reflected in historical events, or whether the change in timing is an artifact of the synthetic hydrology developed.

(2) Step 2: Identify the existing, authorized purpose, and with proposed alteration conditions for all features (e.g. levee, floodwall, channel, jetties, and/or dams) of that system to serve as the basis for assessing H&H changes of proposed alterations.

(3) Step 3: Collect or develop the necessary functions and transforms to compute existing, authorized purpose, and with proposed alteration conditions all index locations within the system. In addition to the various functions required for the H&H system analysis, the uncertainty about each function must be described. This task is completed following the general guidance presented in this appendix and EM 1110-2-1619 (Ref. H-2.b). However, current policy does not cover how to describe the uncertainty about functions that represent accumulated impacts. For example, the uncertainty about the unregulated to regulated discharge transform at a location downstream of multiple reservoirs must reflect the accumulated uncertainty about joint operation of those reservoirs. If the district needs assistance in determining accumulated impacts, districts should consult experts at Engineer and Research Development Center Hydrologic Engineering Center (HEC), or engage the division and HQUSACE. All three conditions should be evaluated as part of the H&H system analysis.

(4) Step 4: Assess the H&H results, reference paragraph H-3.f, of the existing, authorized purpose, and with proposed alteration conditions at all index locations. H&H results are computed location by location within the extent of the system. Analysis needed in this step will depend upon the proposed alteration. For example, if the alteration includes the addition of flood storage or changes to the manner in which available storage is operated, a reservoir system simulation model such as HEC-ResSim (reference H-2.e) may be developed and run with a period of record or selected hypothetical events. Through this model, a new unregulated to regulated discharge transform can be developed. Similarly, if the proposed alteration includes changes to the project geometry, for example through levee setbacks, these changes must be simulated to derive new transforms for downstream locations. Those transforms may change as a result of the project geometry changes. Results may be reported as described in paragraph H-4.

(5) Step 5: Determine the changes in H&H conditions by comparing hydrologic and hydraulic results system-wide for the existing, authorized, and with proposed alteration cases. Once various results of hydrologic and hydraulic conditions are computed and reported, system-wide H&H changes of a proposed alteration can be assessed. For proposed alterations that reduce the likelihood of inundation, the AEP will be less and confidence in reduction in likelihood of inundation will be greater. However, outcomes may vary across all index locations within the system; therefore, all index locations must be assessed.

APPENDIX I

Funding Agreements

I-1. Purpose. The purpose of this appendix is to provide guidance on the establishment, management, and oversight of funding agreements under applicable statutory authorities that allow the US Army Corps of Engineers (USACE) to accept and expend funds to expedite requests to alter USACE Civil Works projects pursuant Section 408. This appendix describes the specific requirements applicable to acceptance of contributed funds and development of funding agreements under each authority.

I-2. References.

- a. 25 USC 479a, Publications of List of Recognized Tribes
- b. Section 1156(a)(2) of WRDA 2016, Contributed Funds (33 USC 408(b)(3))
- c. 23 USC 139(j), Efficient Environmental Reviews for Project Decision-Making
- d. Section 214 of WRDA 2000 (Public Law 106-541), as amended (33 USC 2352)
- e. Section 404 of the Clean Water Act, Permits for Dredged or Fill Material (33 USC 1344)
- f. Section 10 of the Rivers and Harbors Act of 1899, Obstruction of Navigable Waters, Generally; Wharves, Piers, and Excavations and Filling In (33 USC 403)
- g. 10 USC 2695, Acceptance of Funds to Cover Administrative Expenses Relating to Certain Real Property Transactions
- h. US Army Corps of Engineers, Implementation Guidance for Section 1125 of the Water Resources Development Act of 2016 - Use of Funding Agreements within the Regulatory Program, Memorandum, 19 January 2018.

I-3. Policies for All Authorities.

- a. The provision of funds for a Section 408 review by USACE under any of these authorities is voluntary, and all requesters will receive a fair and timely review of their Section 408 request regardless of whether they have contributed funds to USACE for the evaluation or not.
- b. The acceptance and expenditure of funds will not impact impartial decision making at any level with respect to the evaluation and any final decision, either substantively or procedurally. The USACE review of the Section 408 request must comply with all applicable

laws, regulations, and procedures.

c. In general, funds should be accepted under one authority only. In the event that funds will be accepted under more than one authority, separate agreements should be executed and there should be no duplication of activities to be funded between the agreements.

d. Acceptable Uses of Funds. In general, except as noted in paragraph I-3.e., the funds can be used for all activities related to the USACE review of a Section 408 request, including pre-coordination and review activities. Prior to expending funds on any activity, the district must determine that the activity contributes to meeting the specific purpose of the appropriate authority as indicated in this appendix.

e. General Limitations for Funds Accepted for Reviews Under 33 USC 408.

(1) In order to preserve impartial decision making, the funds cannot be used by the final decision-maker for his or her review, recommendations, or decision concerning a Section 408 request.

(2) The funds cannot be used for compliance and enforcement activities. Enforcement activities must be charged to the applicable appropriations account based on the USACE Civil Works project.

(3) The funds cannot be used for Section 408 review activities related to non-federal hydropower development.

(4) The funds cannot be used to cover the administrative expenses incurred in processing a Covered Transaction (such as an easement, or a lease or a license of real property of the United States) under 10 USC 2695 or cost incurred for activities outlined in 30 USC 185(1). Costs associated with these administrative expenses will be recovered under 10 USC 2695 and 30 USC 185(1).

(5) The funds cannot be used to prepare documents or products for the Section 408 requester.

f. Acceptance of Contributed Funds and Accountability.

(1) The funds accepted and expended under a funding agreement, regardless of authority, must be accounted for and tracked to ensure that they are expended for their intended purpose. Receipt and expenditure of funds will be tracked by a separate account in the Corps of Engineers Financial Management System.

(2) Contributed funds will be recorded in 096X8862 as a cost-share control record (CSCR) and collect type code LCSA. The cost share advance account will cite AMSCO 190093 and CCS 408. The cost share control record must link to a zero dollar federal funding account citing

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appropriation 096X3123 and CCS 408. Funding agreements for Regulatory permits are processed differently. There may be cases when there is one funding agreement that covers Section 408 and Regulatory actions. In these cases, the two different processes should still be followed for the funding amount pertaining to each program. In other words, the funding associated with Section 408 activities will use the process described above, and the funding associated with Regulatory permit actions will be processed using different procedures.

(3) Section 408 Coordinators must maintain copies of all funding agreements in the Section 408 database even after completion or closure.

(4) Section 408 Coordinators will be accountable for reporting to HQUSACE annually on the status of any active funding agreements within their area of responsibility when requested. Requirements for reporting are specific to the authority for the funding agreement and are outlined in the paragraphs below for each authority.

I-4. Section 1156(a)(2) of WRDA 2016.

a. Section 1156(a)(2) of WRDA 2016, among other things, further amends Section 14 of the Rivers and Harbors Act of 1899 (33 USC 408; referred to as Section 408) to authorize the Secretary of the Army to accept and expend funds received from non-federal public or private entities to evaluate requests under Section 408 for an alteration or permanent occupation or use of a work built by the United States.

b. Following the process in this appendix, District and Division Commanders may accept and expend funds from non-federal public or private entities to expedite the evaluation of Section 408 requests. Expediting the review process could include generally shorter review times as compared to prior to the agreement and the facilitation of a smoother review process through improved coordination and communication or through the development or use of programmatic agreements or standard operating procedures.

c. The template agreement for the acceptance of funds for the evaluation of Section 408 requests is posted on the USACE agreements website, under "Agreement Templates." The template agreement may be modified as appropriate to address case-specific circumstances. In addition, it may be modified to cover multiple Section 408 requests by a single requester. Following district counsel or division counsel review and concurrence that the negotiated agreement is acceptable, the District Commander or Division Commander, respectively, may approve and sign the agreement.

d. Authority under Section 1156(a)(2) is limited to the acceptance of funds from non-federal public and private entities. Other federal agencies cannot provide USACE with funding under this authority. If the non-federal public or private entity is providing funds that it received from another federal agency, it must provide written confirmation from that federal agency that the funds are authorized to be used for the Section 408 evaluation.

e. Funds accepted under Section 1156(a)(2) cannot be used to cover the review of related Section 10/404/103 permit decisions.

f. Section 408 Coordinators will be accountable for reporting to HQUSACE when requested on the status of any active Section 1156(a)(2) agreements within their area of responsibility.

I-5. Section 214 of WRDA 2000.

a. Section 214, as amended (33 USC 2352) provides that the Secretary of the Army, after public notice, may accept and expend funds contributed by a non-federal public entity, natural gas company, public utility company, or railroad carrier to expedite the permit review process for that entity, company, or carrier for projects or activities that have a public purpose. The authority to accept and expend funds from non-federal public entities does not expire, unless modified by law. The authority to accept and expend funds from public-utility companies, natural gas companies, and railroad carriers expires on June 10, 2024, unless otherwise extended or revoked by law.

b. District and Division Commanders have delegated authority to accept and expend funds under Section 214. These delegations of authority remain in effect until 10 June 2024, unless revoked or superseded.

c. Acceptable Entities. Funding agreements under to Section 214 may be executed with the following entities. Further information on acceptable entities under Section 214 is available in reference I-2.h.

(1) Non-Federal Public Entities. The term “non-federal public entity” is limited to governmental agencies or governmental public authorities, including governments of federally recognized Indian tribes, i.e., any Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe under the Federally Recognized Indian Tribe List Act of 1994 [25 USC 479(a)].

(2) Public-Utility Companies. Public-utility companies include the following two subcategories: (i) electric utility companies, which are companies that own or operate facilities used for the generation, transmission, or distribution of electric energy for sale; and (ii) gas utility companies, which are companies that own or operate facilities used for distribution at retail of natural or manufactured gas for heat, light, or power (other than the distribution only in enclosed portable containers or distribution to tenants or employees of the company operating such facilities for their own use and not for resale).

(3) Natural Gas Companies. Section 214 also allows for funding agreements to be entered into with a natural gas company. A natural gas company is a company engaged in the

transportation of natural gas in intrastate or interstate commerce or the sale of such gas in interstate commerce for resale.

(4) Railroad Carriers. The term “railroad carriers,” is defined at Title 49 USC 20102 as a person providing railroad transportation, or, as approved by the Secretary of Transportation, a group of commonly controlled railroad carriers operating within the United States as a single, integrated rail system. “Railroad” means any form of non-highway ground transportation that runs on rails or electromagnetic guideways, including: a) commuter or other short-haul railroad passenger service in a metropolitan or suburban area; and b) high speed ground transportation systems that connect metropolitan areas, without regard to the technologies used for the system; but c) does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation. Districts may consult with the regional Federal Railroad Administration office if there is uncertainty as to whether a particular entity qualifies as a railroad carrier.

(5) There is no expiration of the authority to accept and expend funding from entities that meet the definition of non-federal public entity, unless modified by law. The authority to accept and expend funding from entities that meet the definition of public utility company, natural gas company, and railroad carrier expires on June 10, 2024, unless otherwise extended or revoked by law.

d. General Guidance. Activities conducted under a Section 214 agreement must expedite the Section 408 review process. Expediting the review process could include generally shorter review times as compared to prior to the agreement and the facilitation of a smoother review process through improved coordination and communication or through the development or use of programmatic agreements or standard operating procedures. The expedited review cannot result in an adverse effect on the timeframes for review of other Section 408 requests within the same district, when considered collectively.

e. Public Purpose. Funding can only be accepted and expended through Section 214 funding agreements to expedite a Section 408 review if the proposed alteration serves a public purpose. Districts must evaluate proposed agreements from non-federal public entities to ensure that the proposed activities needing Section 408 permission serve a public purpose, and districts have discretion in making that determination. It is recognized and allowable that funds provided under a Section 214 agreement with a non-federal public entity may potentially originate from a private entity or a combination of public and private entities, so long as it is verified that the proposed alteration would serve a public purpose.

f. Agreement Development and Decision.

(1) Initial Public Notice for Intent to Accept Funds.

i. Prior to accepting and expending funds, the division or district must issue a public notice,

post the public notice in a clearly identified and easily accessible area (e.g., “Acceptance of Funds for Expediting Section 408 Requests”) on its webpage, and distribute the notice to concerned agencies, organizations, and the interested public. Further information on public purpose within the context of Section 214 is available in reference I-2.h. The district or division should consider if the purpose of this public notice can be combined with the purposes of other public notices that may be also be required, reference paragraph 12.b. of the main EC.

ii. The public notice will describe the entity providing such funds, the USACE authority to accept and expend such funds, the reason for such contributions, how acceptance of the funds is expected to expedite the Section 408 review process, what types of activities the funds will be expended on, what procedures will be in place to ensure that the funds will not impact the division or district’s impartial decision making, and information on the impacts, if any, to the review process for Section 408 requests within that division or district. Further, if funds are also intended to be accepted or have been accepted to expedite the evaluation of Section 10/404/103 permit applications for the same proposed alteration and/or by the same non-federal public entity, such intention should be clearly stated in the public notice or a joint public notice developed, if feasible. The public notice must also include information on the impacts of the proposed funding agreement on the division or district’s ability to review other Section 408 requests.

(2) Basis for Acceptance of Funds.

i. Following the review of the comments received in response to the public notice, the Division or District Commander will determine if the acceptance and expenditure of funds is appropriate in consideration of the requirements under the applicable statutory authority, if the division or district will be able to preserve impartial decision making, and if the acceptance and expenditure of funds will not adversely affect review timeframes for other Section 408 requests. A final draft of a funding agreement, see paragraph I-5.f.(3), must be completed to inform this decision.

ii. If the Division or District Commander determines, after considering public comments, that the acceptance and expenditure of the funds is appropriate, the funds may be accepted and expended. This decision will be documented in a Memorandum for Record (MFR). An informational public notice will be issued regarding the Division or District Commander's decision. The division or district will post the informational public notice on its webpage in the same, easily identifiable and accessible area used for the initial public notice and distribute the notice to concerned agencies, organizations, and the interested public.

(3) Acceptance of Funds.

i. Funds may only be accepted after the finalization of the decision MFR and issuance of the public notice of the execution of the funding agreement. Funding agreements will typically be executed in the format of a Memorandum of Agreement (MOA). At a minimum, the

agreement must include a scope of work and an itemized budget estimate, address the provision of additional funds if needed, as well as the return of unused funds, and must identify the total annual cost for each federal fiscal year covered by the term of the MOA. The itemized budget estimate must include identification of personnel, hourly rates, indirect labor costs, estimated hours of work, and travel costs related to the MOA scope of work.

ii. Issuance of a new public notice is not required for renewal or modification of a funding agreement if the purpose of the agreement remains the same. For example, a new public notice would not be required if the MOA is amended to extend the term of the agreement, modify the proposed alteration identified in the MOA, or adjust the terms of the advance payment contemplated under the MOA. The decision and basis for the renewal or modification should be documented in the MFR described in paragraph I-5.f.(2).

g. No funds provided by a federal agency to a non-federal public entity may be accepted by USACE under Section 214 unless the non-federal public entity forwards to USACE a written confirmation from the federal agency that the use of the funds to expedite the review of the Section 408 request is acceptable.

h. Transparency. Legal requirements under Section 214 require making certain information publicly available on the internet including final decisions and copies of funding agreements. Section 408 Coordinators must ensure timely data entry on Section 408 decisions and maintain copies of all funding agreements in the Section 408 database, even after completion or closure, to facilitate these transparency requirements.

i. Annual Reporting. On an annual basis, HQUSACE will provide an annual report to the Assistant Secretary of the Army for Civil Works (ASA(CW)), including a summary of the use of funding agreements executed under Section 214 and 22 USC 139(j), see paragraph I-6. The ASA(CW) will submit the combined annual report to the specified Congressional committees. Within 30 calendar days of the conclusion of each fiscal year, district and division Section 408 Coordinators will provide to the HQUSACE Section 408 proponent the following:

(1) A list of all active Section 214 and Section 139(j) funding agreements during the subject fiscal year, including the date in which the agreement was initiated and whether Section 214 or Section 139(j) was used;

(2) An accounting of the total funds accepted and total funds expended per funding agreement; and,

(3) A list of all Section 408 decisions issued for the subject fiscal year under each funding agreement.

(4)

I-6. 23 USC 139(j).

a. Section 139(j) provides that the Secretary of Transportation may approve a request by certain public entities that receive financial assistance from the USDOT to provide funds to affected federal agencies participating in the environmental review process to support activities that directly and meaningfully contribute to expediting and improving permitting and review processes.

b. **Acceptable Entities.** Section 139(j) allows USACE to enter into agreements with public entities receiving financial assistance from the Department of Transportation under Title 23 or chapter 53 of Title 49, which are typically administered by the FHWA and the Federal Transit Administration (FTA), respectively. Section 139(j) agreements require approval by the Secretary of Transportation, as public entities are eligible to receive reimbursement with federal aid funds for these agreements. The Secretary of Transportation has delegated approval of funding agreements down to the division level of FHWA and FTA. The USDOT has not interpreted Section 139(j) as allowing other modal administrations (such as Federal Aviation Administration or Maritime Administration) to support agreements with public entities. If there is any uncertainty regarding whether an entity is eligible for a funding agreement under Section 139(j), the entity and/or the district should consult the USDOT operating administration from which the entity receives financial assistance.

c. **General Guidance.** Activities conducted under a Section 139(j) agreement must directly and meaningfully contribute to expediting and improving permitting and review processes, including planning, approval, and consultation processes, for the transportation project or program. In addition, Section 139(j) funds may only be used for activities beyond USACE's normal and ordinary capabilities under its general appropriations. Because transportation project planning and delivery encompasses a variety of activities and reviews, participation in the transportation planning (pre-NEPA) process and streamlining initiatives such as NEPA/Section 408 synchronization efforts are encouraged under Section 139(j), so long as those activities result in review times that are less than the customary time necessary for such a review. FHWA has provided guidance that the development of programmatic agreements and initiatives satisfies the requirement to reduce time limits as long as the results of those efforts are designed to provide a reduction in review time. Section 139(j) puts the onus on FHWA and FTA to interpret allowable activities under the statute. Districts will consider FHWA or FTA's approval of a funding agreement as certification that the agreement is compliant with Section 139(j). Section 139(j) agreements must also meet USACE's standards and requirements contained in this appendix.

(1) FHWA or FTA may require documentation of the "customary time" necessary for a review and/or establishment of performance metrics for the agreement to demonstrate it is contributing to expediting and improving transportation project planning and delivery. Districts have discretion on the number and type of performance metrics within an agreement, including which milestones to use to determine time in review (receipt of request, date determined complete, etc.). When considering the quantity and content of any performance metrics for an

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agreement, the district must consider the potential effect of those metrics on performance management within the whole district. Districts must be cautious to not agree to any performance metrics that would be so onerous or stringent that achieving them comes at the cost of decreased performance for other Section 408 requests in the district.

(2) A Section 139(j) funding agreement between the district(s) or division(s) and the funding transportation agency must include the projects and priorities to be addressed by the agreement. If the funding transportation agency does not know a list of projects and/or priorities at the time of the agreement, then the funding agreement should describe the process to identify or change projects and/or priorities for the agreement.

d. Agreement Development and Decision. Districts will follow the same policy and procedures for establishing agreements under Section 139(j) as what is used for agreements under Section 214.

e. Annual Reporting. Districts will follow the same procedures for annual reporting for funding agreements under Section 139(j) as what is used for agreements under Section 214, reference paragraph I-5.i.

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APPENDIX J

Example Letters

J-1. Purpose. This appendix contains example response letters and an example decision letter. These letters can be modified as necessary to fit each Section 408 request.

J-2. Completeness Determination Letter. This letter is sent to a requester no later than 30 days of receipt of a submittal of information supporting a Section 408 request to inform the requester whether the Section 408 request or a specific milestone for the Section 408 request (for multi-phased reviews) is complete or not. This letter can also be used and modified as necessary to inform the requester of completeness for validation under a categorical permission.

(District Letterhead)
(Date here)

(Name and address of requester here)
[Mr./Ms.] *(Full Name of Requester)*
(Title of Requester)
(Requester Address)
(City, State Abbreviation, and Zip Code)

Section 408 Request Number: *(Database ID)*

Dear [Mr./Ms.] *(Last Name of Requester)*,

The *(district name here)* District (“District”) of the U.S. Army Corps of Engineers (USACE) has received your request to *(brief description of proposed alteration)* the *(name of USACE project to be altered)* operated and maintained by *(name (s) of non-federal sponsor (s) and/or USACE)* under Section 14 of the Rivers and Harbors Act of 1899, 33 USC 408 (Section 408).

(If incomplete include the following.) The District has reviewed your submittal consistent with Engineer Circular (EC) 1165-2-220, to determine whether the Section 408 *(insert “milestone” for multi-phased reviews)* request is complete and is ready for USACE review and decision. We have determined that your Section 408 *(insert “milestone” for multi-phased reviews)* request is incomplete and request that you submit the following additional information:

(Describe required information needed in bullet point format using the below basic requirements

from paragraph 11 of this EC as a framework. Districts can delete those bullet point categories that have been satisfied or are not applicable. Districts can add supplemental information as enclosures if needed to help clarify what information is needed.)

- Statement of No Objection –
- USACE Project and Alteration Description –
- Technical Analysis and Design –
- Environmental and Cultural Resource Compliance –
- Real Estate Requirements –
- Operation, Maintenance, Repair, Replacement and Rehabilitation (OMRR&R) –
- Crediting

Please submit the above information to *(Insert appropriate contact information such as organization code and address)* and include the Section 408 Request Number: *(Insert Database ID for this request)* with your information. For questions regarding your Section 408 request, please contact *(name and title of district Section 408 point of contact here)* at *(contact information here)*.

(If complete, include the following.) The District has reviewed your submittal consistent with Engineer Circular (EC) 1165-2-220 and has determine that you your Section 408 *(insert “milestone” for multi-phased reviews)* request is complete and will proceed to USACE review and decision. The District expects to render a decision on your Section 408 *(insert “milestone” for multi-phased reviews)* request within 90 days *(provide new timeline and explanation if 90 days cannot be met)* of the date on this letter. You will be notified if additional information is needed to complete the review and decision and/or if the review and decision to exceed the 90 day timeline. If you have questions regarding your Section 408 request, please contact *(name and title of district Section 408 point of contact here)* at *(contact information here)*.

Sincerely,
(Name of signatory)

(district name here)
U.S. Army Corps of Engineers

Enclosures *(Attach supplemental documentation as needed).*

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J-3. Potential Multi-phased Review Option. This letter is sent to a requester no later than 30 days of receipt of a submittal of information supporting a Section 408 request that would benefit from the multi-phased review option. This response letter is to inform the requester that they will be contacted for further discussion and planning.

(District Letterhead)
(Date here)

(Name and address of requester here)
[Mr./Ms.] (Full Name of Requester)
(Title of Requester)
(Requester Address)
(City, State Abbreviation, and Zip Code)

Section 408 Request Number: *(Database ID)*

Dear *[Mr./Ms.] (Last Name of Requester)*,

The *(district name here)* District (“District”) of the U.S. Army Corps of Engineers (USACE) has received your request to *(brief description of proposed alteration)* the *(name of federal project to be altered)* operated and maintained by *(name (s) of non-federal sponsor (s) and/or USACE)* under Section 14 of the Rivers and Harbors Act of 1899, 33 USC 408 (Section 408).

Based on the scope, scale, or complexity of the proposed alteration, the District recommends a multi-phased review approach for processing your request. This option allows for information to be submitted with different levels of detail at pre-determined milestones progressing to a Section 408 decision. You will be contacted by *(insert anticipated timeframe)* to further discuss this option.

For any questions regarding this letter, please contact *(name and title of district Section 408 point of contact here)* at *(contact information here)* .

(City, State Abbreviation, and Zip Code)

Section 408 Request Number: (Database ID)

Dear [Mr./Ms.] *(Last Name of Requester)*,

The (district name here) District (“District”) of the U.S. Army Corps of Engineers (USACE) is reviewing your request to (brief description of proposed alteration) to (name of federal project to be altered) operated and maintained by (name (s) of non-federal sponsor (s) and/or USACE) under Section 14 of the Rivers and Harbors Act of 1899, 33 USC 408 (Section 408). This evaluation is being performed according to Engineer Circular (EC) 1165-2-220.

The District anticipates it will be unable to render a decision on your Section 408 request within 90 days of receipt of the completion determination dated *(insert date of the completion determination)*. Additional time is needed to (summarize rationale for exceeding 90 day decision timeline) . The District anticipates rendering a decision *(insert either “within xx days of this letter” or “by date”)*.

For any questions regarding your Section 408 request, please contact (name and title of district Section 408 point of contact here) at (contact information here) .

Sincerely,
(Name of signatory)

 (district name here)
U.S. Army Corps of Engineers

Enclosures *(Attach supplemental documentation as needed)*.

J-6. Section 408 Final Decision Letter. This letter is used to communicate the decision to grant or deny permission under Section 408. It can be used with a single-phase review or for the final milestone of a multi-phased review.

(District Letterhead or Division Letter)
(Date here)

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(Name and address of requester here)
[Mr./Ms.] *(Full Name of Requester)*
(Title of Requester)
(Requester Address)
(City, State Abbreviation, and Zip Code)

Section 408 Request Number: (Database ID)

Dear [Mr./Ms.] *(Last Name of Requester)*,

The (district or division name here) [District or Division] of the U.S. Army Corps of Engineers (USACE) has completed its review of your request to (brief description of proposed alteration) to (name of federal project to be altered) operated and maintained by (name (s) of non-federal sponsor (s) and/or USACE) under Section 14 of the Rivers and Harbors Act of 1899, 33 U.S.C. 408 (Section 408). This evaluation was performed consistent with Engineer Circular (EC) 1165-2-220.

(If granting permission, use the following) Based on this evaluation, the [District or Division] is granting permission to *(describe the approved alteration work in detail)* as specified in your request and subject to compliance with the terms and conditions below and attached.

(Insert any additional special conditions necessary to ensure the alteration is not injurious to the public interest; does not impair the usefulness of the authorized project; and/or for environmental compliance purposes. Also attach a copy of the standard terms and conditions in Appendix K.)

(If denying permission, use the following). Based on this evaluation, the District or Division is denying your request to *(describe the rejected alteration work in detail)*. Your request cannot be approved at this time because *(Simply describe the main reason(s) why we are unable to grant permission. If appropriate, indicate the ability for the requester to revise his/her proposal and submit a new request for Section 408 permission.)*

For any questions regarding your Section 408 permission decision, please contact (name and title of district Section 408 point of contact here) at (contact information here) .

Sincerely,
(Name of District or Division Commander or

other decision-maker with delegated authority)

(district name here)
U.S. Army Corps of Engineers

Enclosures (*Attach supplemental documentation as needed*).

J-7. Categorical Permission Validation Letter. This letter is used to communicate validation (approval) of use of a categorical permission to the requester. Districts should attach a copy of the standard terms and conditions for the categorical permission to this letter.

(District Letterhead or Division Letter)
(Date here)

(Name and address of requester here)
[Mr./Ms.] *(Full Name of Requester)*
(Title of Requester)
(Requester Address)
(City, State Abbreviation, and Zip Code)

Section 408 Request Number: _____
(Database ID)

Dear [Mr./Ms.] *(Last Name of Requester)*,

The _____ *(district or division name here)* [District or Division] of the U.S. Army Corps of Engineers (USACE) has completed its evaluation of your request to _____ *(brief description of proposed alteration)* to _____ *(name of federal project to be altered)* operated and maintained by _____ *(name (s) of non-federal sponsor (s) and/or USACE)* under Section 14 of the Rivers and Harbors Act of 1899, 33 U.S.C. 408 (Section 408). This evaluation was performed consistent with Engineer Circular (EC) 1165-2-220.

Your request to *(describe the approved alteration work in detail)* has been validated for use with *(Insert name of District and/or title of the categorical permission)* Categorical Permission, subject to compliance with the terms and conditions below and attached.

(Insert any additional special conditions necessary to ensure the alteration is not injurious to the public interest; does not impair the usefulness of the authorized project; and/or for

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environmental compliance purposes. Also attach a copy of the standard terms and conditions in Appendix K and the terms and conditions specific to the categorical permission.)

For any questions regarding your Section 408 permission decision, please contact (name and title of district Section 408 point of contact here) at (contact information here).

Sincerely,
*(Name of District Commander or
other decision-maker with delegated authority)*

(district name here)
U.S. Army Corps of Engineers

Enclosures *(Attach a copy of the standard terms and conditions in Appendix K and the terms and conditions of the categorical permission).*

APPENDIX K

Standard Terms and Conditions

This appendix includes the standard conditions that must be included in all Section 408 approval notifications, except where marked as optional. Use of optional conditions should be based on scope and scale of the approved activity:

LIMITS OF THE AUTHORIZATION

1. This permission only authorizes you, the requester, to undertake the activity described herein under the authority provided in Section 14 of the Rivers and Harbors Act of 1899, as amended (33 USC 408). This permission does not obviate the need to obtain other federal, state, or local authorizations required by law. This permission does not grant any property rights or exclusive privileges, and you must have appropriate real estate instruments in place prior to construction and/or installation.
2. The time limit for completing the work authorized ends on _____. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least one month before the above date is reached.
3. Without prior written approval of the USACE, you must neither transfer nor assign this permission nor sublet the premises or any part thereof, nor grant any interest, privilege or license whatsoever in connection with this permission. Failure to comply with this condition will constitute noncompliance for which the permission may be revoked immediately by USACE.
4. The requester understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration of the work herein authorized, or if, in the opinion of the Secretary of the Army or an authorized representative, said work will cause unreasonable conditions and/or obstruction of USACE project authorized design, the requester will be required upon due notice from the USACE, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim can be made against the United States on account of any such removal or alteration.

INDEMNIFICATION AND HOLD HARMLESS

5. The United States will in no case be liable for:
 - a. any damage or injury to the structures or work authorized by this permission that may be caused or result from future operations undertaken by the United States, and no claim or right to compensation will accrue from any damage; or
 - b. damage claims associated with any future modification, suspension, or revocation

of this permission.

6. The United States will not be responsible for damages or injuries which may arise from or be incident to the construction, maintenance, and use of the project requested by you, nor for damages to the property or injuries to your officers, agents, servants, or employees, or others who may be on your premises or project work areas or the federal project(s) rights-of-way. By accepting this permission, you hereby agree to fully defend, **indemnify**, and **hold harmless** the United States and USACE from any and all such claims, subject to any limitations in law.
7. Any damage to the water resources development project or other portions of any federal project(s) resulting from your activities must be repaired at your expense.

REEVALUATION OF PERMISSION

8. The determination that the activity authorized by this permission would not impair the usefulness of the federal project and would not be injurious to the public interest was made in reliance on the information you provided.
9. This office, at its sole discretion, may reevaluate its decision to issue this permission at any time circumstances warrant, which may result in a determination that it is appropriate or necessary to modify or revoke this permission. Circumstances that could require a reevaluation include, but are not limited to, the following:
 - a. you fail to comply with the terms and conditions of this permission;
 - b. the information provided in support of your application for permission proves to have been inaccurate or incomplete; or
 - c. significant new information surfaces which this office did not consider in reaching the original decision that the activity would not impair the usefulness of the water resources development project and would not be injurious to the public interest.

CONDUCT OF WORK UNDER THIS PERMISSION

10. You are responsible for implementing any requirements for mitigation, reasonable and prudent alternatives, or other conditions or requirements imposed as a result of environmental compliance.
11. Work/usage allowed under this permission must proceed in a manner that avoids interference with the inspection, operation, and maintenance of the federal project.
12. In the event of any deficiency in the design or construction of the requested activity, you are solely responsible for taking remedial action to correct the deficiency.
13. The right is reserved to the USACE to enter upon the premises at any time and for any purpose necessary or convenient in connection with government purposes, to make inspections, to operate and/or to make any other use of the lands as may be necessary in connection with government purposes, and you will have no claim for damages on

- account thereof against the United States or any officer, agent or employee thereof.
14. You must provide copies of pertinent design, construction, and/or usage submittals/documents. USACE may request that survey and photographic documentation of the alteration work and the impacted project area be provided before, during, and after construction and/or installation.
 15. You may be required to perform an inspection of the federal project with the USACE, prior to your use of the structure, to document existing conditions.
 16. USACE shall not be responsible for the technical sufficiency of the alteration design nor for the construction and/or installation work.
 17. (optional, at the discretion of the district) Once permission is granted, you must notify the USACE District at least _____ () days before work/usage is started so that post-permission over sight can be performed by USACE.
 18. (optional, at the discretion of the district) You must schedule a final inspection with the USACE within _____ () days after completion of the work/usage.
 19. (optional, at the discretion of the district) You must submit a copy of "as-built" drawings within _____ () days of completion of work showing the new work as it relates to identifiable features of the federal project.

APPENDIX L

Terms and Abbreviations

AEP	Annual Exceedance Probability
ASA(CW)	Assistant Secretary of the Army for Civil Works
CEQ	Council on Environmental Quality
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CFR	Code of Federal Regulations
CWBI	Civil Works Business Intelligence
DSO	Dam Safety Officer
DSOG	Dam Safety Oversight Group
EA	Environmental Assessment
EC	Engineer Circular
EFH	Essential Fish Habitat
EIS	Environmental Impact Statement
EO	Executive Order
EPA	Environmental Protection Agency
ERDC	Engineer and Research Development Center
ESA	Endangered Species Act
FAST-41	Title 41 of the Fixing America's Surface Transportation Act
FCA	Flood Control Act
FERC	Federal Energy Regulatory Commission
FHWA	Federal Highway Administration
FONSI	Finding of No Significant Impact
FTA	Federal Transit Administration
H&H	Hydrology and Hydraulics
HEC	Hydrologic Engineering Center
HQUSACE	Headquarters USACE
LSO	Levee Safety Officer
LSOG	Levee Safety Oversight Group
LSPM	Levee Safety Program Manager
M&I	Municipal and Industrial
MFR	Memorandum for Record
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
NEPA	National Environmental Policy Act
NFIP	National Flood Insurance Program

NHPA	National Historic Preservation Act
NID	National Inventory of Dams
NLD	National Levee Database
NOAA	National Oceanic and Atmospheric Administration
O&M	Operation and Maintenance
OMRR&R	Operation, Maintenance, Repair, Replacement, and Rehabilitation
PL	Public Law
QCP	Quality Control Plan
RIT	Regional Integration Team
RMC	Risk Management Center
RMO	Review Management Organization
ROD	Record of Decision
SAR	Safety Assurance Review
SLOPES	Standard Local Operating Procedures for Endangered Species
USACE	U.S. Army Corps of Engineers
USC	United States Code
USCG	U.S. Coast Guard
USDOT	U.S. Department of Transportation
USFWS	U.S. Fish and Wildlife Service
WCM	Water Control Manual
WRDA	Water Resources and Development Act
WRRDA	Water Resources Reform and Development Act
WSA	Water Supply Act