

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

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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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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 pursuant to 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 in accordance 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, 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 in accordance with this EC for an alteration to 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 pursuant to Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, 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 water resources development 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 (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, and consistency in implementation within division 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 (AIS), 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 publically 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, including contact information, and a link to the HQUSACE Section 408 public webpage and database, is available on district-specific public webpages.

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 for 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) of 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 for an alteration or permanent occupation or use of a work built by the United States. 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, 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 Section 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 associated with a lengthy evaluation.

(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 in accordance 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. 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. 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.

(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 Section 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 publically available. Districts must ensure sensitive information provided by federally recognized Tribes is not disclosed and 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 be in accordance 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. Validations 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 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 pursuant to 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, 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 outlines how Regulatory and Section 408 reviews must be either consolidated or effectively aligned depending on certain circumstances.

a. Geographical Limitations.