



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

CECW-CE

NOV 10 2016

MEMORANDUM FOR Commanders, Major Subordinate Commands and Districts

SUBJECT: Interim Guidance on Section 408 Decision Level

1. References.

a. Engineer Regulation 1165-2-208, dated 16 December 2015, In-Kind Contribution Credit Provisions of Section 221(A)(4) of the Flood Control Act of 1970, As Amended.

b. Engineer Circular 1165-2-216, dated 30 September 2015, Policy and Procedural Guidance for Processing Requests to Alter U.S. Army Corps of Engineers Civil Works Projects Pursuant to 33 USC 408.

c. Engineer Circular 1165-2-214, dated 15 December 2012, Civil Works Review.

2. Purpose. This memorandum, effective immediately, provides revised guidance on the decision level for Section 408 requests and replaces the decision level guidance in Paragraph 6.t. in Engineer Circular (EC) 1165-2-216. The content of this memorandum and any other revisions to decision level will be incorporated into a revised EC for Section 408.
3. Applicability. This guidance applies to all Headquarters, U.S. Army Corps of Engineers (HQUSACE) elements, divisions, districts, and field operating activities having responsibility for Civil Works projects.
4. Authorization. Section 14 of the Rivers and Harbors Act of 1899, codified in 33 U.S.C. 408 (Section 408), authorizes the Secretary of the Army to grant permission to a private, public, tribal, or another federal entity for the temporary or permanent alteration or use of a U.S. Army Corps of Engineers (USACE) Civil Works project if the Secretary determines that the alteration or use will not be injurious to the public interest and will not impair the usefulness of the project.
5. Background. In July 2014, USACE issued EC 1165-2-216 which consolidates and provides one comprehensive policy and procedural document for processing Section 408 requests in order to improve consistency across USACE and across types of Civil Works projects (e.g., dams, hydropower, levee systems, channels and navigation). The decision authority for approving or denying Section 408 requests was delegated by the Assistant Secretary of the Army (Civil Works) to the Chief of Engineers on 16

CECW-CE

SUBJECT: Interim Guidance on Section 408 Decision Level

April 2004. This delegation of authority was then further delegated by the Chief of Engineers to the Director of Civil Works (DCW) on 2 April 2009. The DCW is authorized to re-delegate authority for Section 408 decisions to Division and District Commanders.

6. HQUSACE Review and Decision. The following Section 408 requests will require a final decision by the DCW at HQUSACE following submission of the analysis and recommendation of approval by the Division and District Commanders:

a. Proposed alterations that change how the USACE project will meet its authorized purpose. An example would be a proposed alteration to permanently breach a levee system for ecosystem restoration purposes but raise all structures behind the levee to achieve the same flood risk management benefits. This project still meets the authorized flood risk management purpose, but in a different manner.

b. Proposed alterations that preclude or negatively impact alternatives for a current General Investigation (GI) or other USACE study.

c. Proposed alterations for the installation of hydropower facilities.

d. 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.

7. Division Review and Decision. The following are the Section 408 requests that will require a final decision by the Division Commander after reviewing the analysis and recommendation for approval by the District Commander. Division Commanders may not further delegate these decisions.

a. Proposed alterations that require a Type II IEPR, reference EC 1165-2-214.

b. Proposed alterations for which the non-federal sponsor for a USACE project is seeking potential credit under Section 221(a)(4) 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. Reference ER 1165-2-208 for requirements regarding credit for in-kind contributions.

c. Proposed alterations that could be approved by the District Commander, but the Division Commander established a regional process that requires certain district Section 408 decisions to be made by that Division Commander.

CECW-CE

SUBJECT: Interim Guidance on Section 408 Decision Level

8. District Review and Decision. All other decisions for Section 408 requests not included in paragraphs 6 and 7 of this memorandum may be rendered by the District Commander. District Commanders may not further delegate these decisions.

9. National Environment Protection Act (NEPA). The appropriate NEPA decision document (Record of Decision, Finding of No Significant Impact, or documentation of the applicability of a Categorical Exclusion) will be signed by the USACE official making the decision for the corresponding Section 408 request.

10. Categorical Permissions. For clarification, while a categorical permission must be created and approved by a District Commander, Division Commander, or Director of Civil Works depending upon the region in which it is applicable, subsequent verifications that an approved categorical permission applies to a specific action can be delegated. The delegation should be established through the process used to create the categorical permission.

11. Elevating Decisions. Division and District Commanders should consider whether a decision for a specific Section 408 request should be elevated to the next decision level based on the unique or special circumstances involved. The following are examples of the types of considerations for elevating a Section 408 decision level:

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

12. Section 408 Requests Currently Under Review. For those Section 408 requests already submitted to the Regional Integration Team (RIT) at HQUSACE or logged in with the Office of Water Project Review for HQUSACE review and decision, the DCW will continue to be the deciding official. All other pending Section 408 requests will follow this guidance.

13. Internal Reporting. An internal reporting process to periodically review Section 408 decisions made at all levels will be developed. This review will assess consistency of documentation of decisions; compliance with policy; and experience in implementation to inform policy improvements. More detailed supplementary guidance as to what information will be collected will be provided at a later date.

CECW-CE

SUBJECT: Interim Guidance on Section 408 Decision Level

14. Vertical teaming among the division, district, and HQUSACE is encouraged when there is any question as to the appropriate course of action related to the application of this guidance.

15. The point of contact is Ms. Tammy Conforti, Special Assistant for Levee Safety, who can be reached at 202-761-4649 or Tammy.L.Conforti@usace.army.mil.



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