



# IMPROVING SECTION 408

U.S. ARMY CORPS OF ENGINEERS

BUILDING STRONG®

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## Background

The U.S. Army Corps of Engineers (USACE) Section 408<sup>1</sup> policy sets forth the process USACE uses to review requests by other entities, which could be any public or private entity, to alter a USACE Civil Works project.<sup>2</sup> Example reasons for alterations to a Civil Works project may include communities wanting to increase recreational opportunities; a local project sponsor wanting to improve flood risk management; or a business or utility company seeking to run power lines or pipelines over or through a Civil Works project. The purpose of a USACE Section 408 review is to ensure that the congressionally-authorized benefits of a project are protected and maintained (e.g., flood risk management, navigation, coastal storm damage reduction) and to ensure what is being proposed is not injurious to the public interest. An effective and efficient review of proposed alterations for Civil Works projects protects taxpayer investments while ensuring compatibility with new infrastructure, improvements, and other public or private interests.

USACE issues guidance and procedures as formal publications, such as Engineer Manuals, Engineer Circulars and Engineer Regulations. Each type of publication has a specific scope and expiration requirements. The first comprehensive Section 408 policy was issued as an Engineer Circular (EC) on July 31, 2014. An Engineer Circular is intended to be interim, valid for two years, but is sometimes extended for a short period. Engineer Circulars are used to allow for revisions before a process is documented in a more long-term publication. Based on lessons learned in implementing the July 2014 EC, USACE began the process to revise and update the Section 408 policy to clarify applicability, roles and responsibilities, and the basic requirements.

## Interim Improvements

Between November 2016 and January 2018, USACE issued interim guidance to improve the Section 408 process while continuing to work on a new policy document to replace the July 2014 EC. Interim improvements included:

- Clarification on the applicability of Section 408 to activities within navigable waters, reducing the number of Section 408 permissions required;

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<sup>1</sup> Section 14 of the Rivers and Harbors Act of 1899, as amended, and codified in 33 USC 408 (Section 408), provides that it is not lawful for any person to alter a project built by USACE without permission from the Army. Section 408 provides that permission to alter a project can be granted if the Secretary of the Army determines the alteration will not be injurious to the public interest and will not impair the usefulness of the project.

<sup>2</sup> Activities that occur outside the lands and real property interests identified and acquired for the project or outside the navigation servitude that could potentially alter a USACE project are not subject to the process set forth in the Section 408 EC.

- Delegation of some decisions from Headquarters USACE to division offices and eliminating the need for an Environmental Impact Statement (EIS) as a trigger for Headquarters review, reducing the number of requests requiring Headquarters review;
- Authority for district commanders to further delegate Section 408 decisions, reducing the review time for some Section 408 decisions;
- Authority for districts to accept and expend contributed funds to expedite the Section 408 review process;
- Clarification that project sponsors carrying out operation and maintenance activities that do not involve changing the design or physical dimensions of the Civil Works project are not alterations triggering Section 408, reducing the number of sponsor-led activities that require Section 408 permission; and,
- Removal of the minimum level of detail requirement of 60 percent complete plans and specifications and instead specifying use of the district's best professional judgment to determine the appropriate level of detail in order to make a Section 408 decision on a case-specific basis.

### **New Draft Section 408 Policy Document**

USACE has completed a new draft EC, EC 1165-2-220, and will solicit comments on this document internally to USACE and broadly with the general public. It is expected that the review and comment activities will go through the end of February 2018. Following the comment period, USACE will consider all comments received, make revisions as needed, and publish a new final EC as soon as possible. The proposed improvements in the new draft Section 408 policy document will include, at a minimum:

- All interim improvements currently being implemented and described above;
- Eliminating duplication of effort by aligning Section 408 decisions with the USACE Real Estate outgrant and certain Regulatory Section 10 processes;
- Delegation of all Section 408 decisions to division and district offices;
- Creation of a multi-phased review option for requesters who want to pursue Section 408 permission in milestones or smaller phases;
- Implementation of review and notification timelines in accordance with WRDA 2016;
- Creation of new appendices that include more detailed processes, standard conditions, and templates to improve consistency and efficiency; and,
- Along with the new policy document, a Section 408 tracking database is under development and will serve as the database system of record for all future Section 408 requests. A subset of fields from this database will be made publicly available to provide information on the current status of Section 408 requests received. The expectation is that the database will be ready for use at the time the new Section 408 EC is finalized.

### **For More Information**

- Visit <http://www.usace.army.mil/Missions/Civil-Works/Section408/>
- Email [HQ-Section408@usace.army.mil](mailto:HQ-Section408@usace.army.mil)