April 6, 2018

Ms. Tammy Conforti  
U.S. Army Corps of Engineers  
ATTTN: CECW-CE/3E62  
441 G Street NW  
Washington, D.C. 20314-1000

Re: Draft Circular Implementing Section 408, Circular No. 1165-2-220  
Docket No. COE-2018-0003

Dear Ms. Conforti:

The National Waterways Conference (NWC) submits these comments in response to the U.S. Army Corps of Engineer’s draft Circular implementing Section 408, Title 33, of the United States Code. 83 Fed. Reg. 5,075 (Feb. 5, 2018); 83 Fed. Reg. 8,251 (Feb. 26, 2018) (extending comment deadline to April 6, 2018). We appreciate this opportunity to share our views.

About NWC

NWC was established in 1960 and is dedicated to a greater understanding of the widespread public benefits of our Nation’s water resources infrastructure. Our mission is to effect common sense policies and programs, recognizing the public value of our Nation’s water resources and their contribution to public safety, a competitive economy, national security, environmental quality, and energy conservation. Conference membership is diverse and includes the full spectrum of water resources stakeholders, including flood control associations, levee boards, waterways shippers and carriers, industry and regional associations, hydropower producers, port authorities, shipyards, dredging contractors, regional water supply districts, engineering consultants, and state and local governments. Some of our members are public entities, some are private corporations, and some are individuals.

1. The Draft Circular Applies Beyond the Scope of Section 408.

Section 408 applies in the case of certain proposed actions at “any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States,” and certain other equipment associated with “the construction of such work under the control of the United States,” where such a work is “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.”¹ In other words, the statute clearly applies to proposals affecting structures that serve the purposes identified in the statute.

In contrast to the statutory language, the draft circular applies to Corps “projects.” The Circular states that it applies to any request “to make alterations to, or temporarily or permanently occupy or use, any US Army Corps of Engineers (USACE) federally authorized Civil Works project.”² Under this language and Corps practice to date, the Corps’ 408 process affects proposals for unimproved real property within the boundaries of the Corps project. Of course, the Corps is entitled to review proposals for an activity on Corps real estate, as has been the standard practice of the Corps districts for many years. However, to apply Section 408 on top of that real estate review exceeds the authority granted by that section, where there is no effect on a work identified in Section 408.

Our reading of Section 408 is supported by the statutory context, the plain meaning of the text, and case law. Section 408 specifically protects any “sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States.” Although the statute does not expressly define “other work,” the list of specific improvements that constitute “works” and the term “built by” show the kinds of structures Congress had in mind. All of the works listed in the statute have two characteristics in common: (1) an intentional function or purpose connected to and in support of the improved waterway; and (2) an artificial, structural presence. Unimproved real estate and any other features not of like kind with the works identified in Section 408 are, therefore, outside the coverage of the 408 process.

The limited case law is in agreement with this position. In United States v. Agioi Victores, a U.S. Court of Appeals held that an improvement lacking a distinct structure—in that case, a navigational channel—was not a “work” under Section 408.³ The court applied the principle of “ejusdem generis” to conclude that a dredged ship channel was not an “other work” under Section 408 because “[a] dredged channel has no resemblance to any of the works specified in the section,” all of which are “physical structures.”⁴ The

¹ 33 U.S.C. § 408(a) (emphasis added).
² EC 1165-2-220, ¶ 1 (emphasis added); see also EC 1165-2-220, ¶ 2 (“This EC is applicable to all headquarters USACE elements, divisions, districts, laboratories, and field operating activities related to USACE Civil Works projects.”).
³ 227 F.2d 571 (9th Cir. 1955).
⁴ 227 F.2d at 572; see also United States v. Logan & Craig Charter Serv., 676 F.2d 1216, 1219 (8th Cir. 1982) (holding that a barge anchored to a lock on the Mississippi River was a “work” under Section 408 because it functioned as an extension to the entry channel and facilitated use of the channel). The principle of ejusdem generis suggests, where there is a list of general words (like “work”) and specific words (like “jetty” or “pier”), “the general words are confined to the class and may not be used to enlarge it.” Cleveland v. United States, 329 U. S. 14, 18 (1946).
channel at issue in the *Agioi Victores* case was, if anything, more similar to the “works” regulated by Section 408 than ordinary real estate within a Corps project (a channel directly serves navigation, and it may even require dredging or other physical work to maintain its usefulness). Even in that case, however, the channel did not have enough structure for the court to find that it was a “work” under Section 408. It follows, then, that real estate is not automatically covered by Section 408 solely on the basis of being located within the boundaries of a Corps project.

Again, NWC does not suggest a proposal within a Corps project is beyond real estate review or any other potentially applicable authorities (Clean Water Act (CWA) Section 404, Rivers and Harbors Act (RHA) Section 10, the National Environmental Policy Act (NEPA), etc.). The point is only that additional procedures to implement Section 408 should be limited to an element of a Corps project that is listed in the statute or is otherwise a “work” for purposes of Section 408.

- **Recommendation**: Allow the proponent of a project on Corps property, who believes the proposal does not affect a “work” for purposes of Section 408, to apply for any permissions otherwise required, such as with the district real estate office, and provide information sufficient to demonstrate 408 review is unnecessary. Authorize this office to make this determination within a specific time. If the decision must reside with the 408 Coordinator, clarify the standard for that person, i.e., that proposals that do not impact or affect 408 assets are not subject to 408 review.

2. **NWC Supports Coordination of the Section 408 Process with Other Reviews to Avoid Unnecessary Duplication of Effort.**

The reviews required by Section 408 can overlap with those required under RHA Section 10, CWA Section 404, and various other authorities governing related activities. Where a Section 10 or Section 404 proposal is covered by a Nationwide Permit (NWP), it has already undergone NEPA review to the extent of the Corps 10 or 404 authorization. In other instances, the Corps may review proposals that are repetitive in nature or minor in effect, which may be appropriate for categorical permissions as outlined in the draft circular. We encourage the Corps to make the most of any opportunities to take advantage of reviews already occurring under other authorities and to make categorical permissions available as much as possible and appropriate.

a. **Coordination with Section 10 and Section 404.**

An NWC member has reported a district office’s requiring a 408 review for activity associated with existing underground or overhead utility crossings, including minor activities such as pole replacement and new manholes. Even assuming this is within the proper scope of Section 408, any such crossings are adequately covered by the Section 10 review and the NEPA process associated with action under Section 10. In
addition, maintenance of an existing facility without a change in its footprint is likely authorized by NWP 3, if Section 10 or Section 404 authorization is required. Work of this nature should not require additional Section 408 review (assuming, of course, the work does not impact an engineered structure, such as, for example, work requiring earth moving on a Corps dike or levee).

- **Recommendation:** Where Section 10 review is required due to a river crossing or other potential effect on navigation, or 404 authorization is required, but there is no effect on a Corps structure or work, allow the applicant to demonstrate that Section 10 review is sufficient. Authorize the district regulatory office to make this determination within a specific time.

b. **Ongoing Maintenance and Repair Activities.**

Paragraph 8.c. of the proposed Circular very sensibly contains an express exemption for maintenance and repair activities “conducted by non-federal sponsors on the USACE project for which they have operation and maintenance responsibilities.” We support that provision. However, there is no reason to so limit the exemption.

Where any ongoing maintenance and repair activities are within the reasonable contemplation of a prior approval, no further Section 408 review should be required of that party. For example, where a third-party operates under an agreement with the Corps to maintain the project in response to weather, river sedimentation, or any other contemplated and expected events, Section 408 review should not be required for ongoing activities contemplated under the agreement. Likewise, where an operator places dredged material in a dredged material processing facility, that is simply using the project for its intended purpose, under whatever parameters the Corps has approved previously. These activities should not be subject to additional 408 review. If any activities like this have legitimate 408 effects, that should be considered at the time of the initial decision or agreement, but not in a manner that burdens previously approved activities. This principle should apply to third parties whether they are the non-federal sponsor or not (dredging contractors, port owners within a Corps project, etc.).

- **Recommendation:** Clarify that Section 408 approval is not needed for any ongoing operations or maintenance activities that conform to a prior approval.

- **Recommendation:** Revise Paragraph 8.c. to include any parties with ongoing operations or maintenance responsibilities.

c. **Review by Multiple Districts.**

NWC members support the Corps’ emphasis on concurrent review in Paragraph 7.h.(2). Nevertheless, Corps regulators have sometimes displayed hesitancy in investing
resources in reviews under those other authorities because they are not assured the Section 408 request will be approved. Although preliminary meetings on 408 requests have helped, Corps leadership needs to take concrete steps to ensure that concurrent review of all Section 408 applications occurs consistently.

- **Recommendation:** We encourage Corps leadership at the Headquarters and Division levels to ensure all participating districts honor the lead for the district so designated and to complete their portion of the review expeditiously.

**d. Coordination of NEPA Reviews.**

Where a project is subject to other Corps authorizations, there may be an established NEPA process, as in the case of Section 10 and Section 404 authorizations discussed above. Where the Corps has already performed its NEPA review (as in the case of an activity covered by an NWP or another preexisting general permit, such as a regional permit) or is otherwise required to prepare NEPA documentation (as in the case of an individual permit), no further NEPA process is required with respect to any issues addressed in that NEPA analysis. With respect to 408 reviews, whenever a separate NEPA review is complete or in process, that document presumptively addresses the issues required for consideration under NEPA. Any additional 408 reviews should be clearly limited to the potential impacts to the Corps asset and its functionality (to the extent not considered in the existing NEPA process) or impacts beyond the geographic scope of the existing NEPA analysis.

NWC supports Paragraphs 10.d.(3), (4), and (5) in their apparent effort to avoid duplication, inefficiency, and wasted resources within the NEPA process. However, we believe the Circular should require, rather than encourage, reliance on existing NEPA documentation and forbid duplicative review (meaning, review of an issue that has already been considered). Also, the Corps should require its districts to identify areas where programmatic NEPA documents and/or programmatic environmental consultations could be used in Section 408 requests regularly processed in that district. The Corps should also provide resources to develop them, as appropriate.

- **Recommendation:** To the extent a proposal is covered by a general permit previously reviewed under NEPA, or NEPA documentation is otherwise required under other authorities, ensure no additional NEPA review is undertaken except to the extent necessary to consider the specific Section 408 effects (impacts on Corps structures and works), and even then only if 408 impacts are inadequately addressed otherwise.

- **Recommendation:** Revise Paragraph 10.d.(3) to require districts, to the extent practicable, to rely on any NEPA documentation that may already exist and more clearly prevent duplicative environmental reviews.
• **Recommendation:** Revise Paragraph 10.d.(5) to require districts to identify areas where programmatic NEPA documents and/or programmatic environmental consultations could be used in reoccurring Section 408 requests.

e. **Categorical Permissions and Procedural Review Plans.**

NWC encourages the Corps to require its districts to make every effort to utilize categorical permissions (¶ 9.a., Appendix C) and procedural review plans (¶11.c.(2)) as much as possible. Robust use of each can “expedite and streamline the review and decisions of Section 408 requests that are similar in nature and that have similar minimal impacts to the USACE project and the environment.” Further, the Corps should develop categorical exclusions, categorical permissions, and procedural review plans to address projects that are governed by other, overlapping authorities, such as Section 10, CWA 404, nationwide permits, etc.

One appropriate example may be the many dock repairs, replacements and expansions on the Mississippi River Ship Channel that do not impact the navigation channel. Another instance would be shoreline stabilization projects that occur adjacent to a federal channel, but in shallow waters along the banks. To the extent the Corps may assert a navigation servitude on a “bank to bank” basis, it can result in the assertion of 408 authority for work in waters as shallow as five feet or less, where vessels using federal channels cannot navigate. We question whether this is an appropriate application of Section 408 at all. In any event, to the extent the draft circular applies and the work as described in this paragraph recurs on a frequent or regular basis, a categorical permission would be appropriate and helpful to the parties carrying out the activity, any state or local regulators, and the Corps’ own district offices.

The proposed Circular discusses these tools in a helpful manner, but experience suggests that districts will have difficulty finding the time and resources to utilize them consistently. NWC, therefore, urges the Corps to take concrete steps to ensure that all three of these valuable tools are regularly used.

• **Recommendation:** Develop categorical permissions and procedural review plans to address projects that are repetitive or regular or can be coordinated with other authorities (Section 10, 404 permitting, NWPs, etc.) and solicit proposals from affected parties to use these mechanisms.

3. **Exclude Non-Federal “Legacy” Assets.**

The text of Section 408 clearly limits application of the provision to “public works.” The larger context of Section 408 and the RHA makes it reasonable to assume that Congress intended to further limit application of Section 408 to federal public works, i.e., projects “built by the United States” or “under the control of the United States,” as
the statute says. The statute is silent as to what happens when a work built by the United States passes out of federal ownership, nor does the statute discuss any regulation of non-federal assets.

Works that have long since reverted to non-federal ownership, such as a port authority or state or local flood control district, should no longer fall within the proper reach of Section 408. The Corps historically was involved in any number of improvements in and around port facilities, some of which have been owned, operated, and maintained by state or local port authorities or private parties for many years. The Corps no longer has the same kind of interest as it would if the asset remained subject to Corps ownership and operation. Such facilities today may not even serve the same kind of functions as the typical Corps waterway project (channel navigation, flood control, etc.). This is true as a general statement but also more obvious when the result is disparate or selective regulation in a given area or region, where some facilities are regulated and others are not, based only on the construction method many years ago and not on the purpose or function of the structures.

In these kinds of situations, where the Corps’ main concern is shoreline work that may interfere with navigation, RHA Section 10 provides a more appropriate source of authority to address the Corps’ interests. It is unnecessary for the Corps to rely on its historic participation in the long-past construction of some phase or portion of a facility as a means to assert Section 408 authority over current activities at facilities not owned by the Corps.

- **Recommendation:** Clarify that Corps 408 authorization is not required for uses of waterways, flood control projects, and public works projects where ownership and operational authority have reverted to state, local, and/or private parties.

4. **Exclude Proposals that Are Adequately Regulated and Do Not Directly Impact Corps Assets.**

Where the effect of a proposal on a Corps asset is only indirect, and other authorities govern those indirect impacts, an additional overlay of the Section 408 process is unnecessary and should be avoided. One example of this is a proposal to raise a nonfederal levee, where the Corps evaluates any associated flood-related issues. This scenario is addressed more directly and specifically through the Corps’ flood control regulations found at 33 C.F.R. Part 208. Where Part 208 applies, and the only effect on a Corps asset is a potential difference in projected flood effects (i.e., where there is no proposal to undertake a physical action at a Corps asset or that directly impacts Corps assets through adjacent excavation, etc.), Part 208 is the appropriate source of regulatory authority. The Corps should not add another bureaucratic layer of review by requiring an additional Section 408 review.
Recommendation: Clarify that any activity that does not directly impact Corps assets is presumptively not subject to 408 review. Specifically, clarify that a proposal adequately governed by Part 208, that does not directly affect a Corps asset, is not subject to Section 408 review.

5. Where a Proposal Impacts a Non-Federal Sponsor, the Non-Federal Sponsor Must Have an Active and Co-authoritative Role.

NWC members include non-federal sponsors of Corps projects who understand the immense value of communication and coordination between the Corps, the project proponent, and non-federal sponsors. Some non-federal sponsors are deeply involved in a given project, up to and including serving as the owner and operator of project facilities. In some instances, despite the Corps’ critical role, the non-federal sponsor may be better situated than the Corps to understand the impacts and practical effects of the proposal. It is critical that non-federal sponsors have the opportunity to review the proposal and identify any possible impacts to them. If a non-federal sponsor determines that the proposal is inconsistent with the non-federal sponsor’s operations or responsibilities, the Corps must recognize and honor the non-federal sponsor’s determination.

Recommendation: Revise Paragraph 12, Notification and Review Timelines, to ensure appropriate notification to and inclusion of the non-federal sponsor.

NWC supports the proposed Circular’s efforts to involve non-federal sponsors in various aspects of the 408 process. Specifically, NWC supports the Circular’s inclusion of the non-federal sponsor in the process to consider a proposal offered by another party, including especially the requirement of Paragraph 10.a. that the 408 proposal have the non-federal sponsor’s support. NWC further urges the Corps to involve non-federal sponsors in pre-coordination meetings with requestors, and all other planning meetings with the requestor throughout the 408 process.

Recommendation: Allow the opportunity for the non-federal sponsor to be present at any pre-coordination meeting and other meetings with the requestor on the 408 request and honor any determination that the proposal is inconsistent with the non-federal sponsor’s operations or responsibilities.

NWC opposes the provisions of Paragraph 10.a.(4) allowing a party with eminent domain authority to proceed without the assent or even over the objection of the non-federal sponsor. It is not the Corps’ responsibility to determine the rights of third parties based on state law, nor does the Corps possess the expertise or authority to do so. Where the non-federal sponsor has operational responsibilities and rights at a Corps project, the possibility that a proposal could interfere with those operations is not necessarily greater or lesser based on the proponent’s eminent domain authority. If the proponent of an
activity asserts a right to pursue that proposal over the non-federal sponsor’s objection under state law, that is a matter to be resolved under state law, not this circular.

- **Recommendation:** Strike provisions of Paragraph 10.a.(4) waiving the Statement of No Objection requirement for entities that claim a right of eminent domain.

6. **The Draft Circular Should Be Implemented in an Efficient and Timely Manner.**

   While NWC supports many aspects of the proposed Circular, its members still fear that the continued complexity of the Section 408 approval process will result in high costs and long waits for business and industry—especially if it is applied, as currently written, to all Corps projects. To ensure that the final guidance is implemented in an efficient and timely manner, NWC offers the following comments.

   a. **Minimizing Elevated Reviews.**

      We understand and support efforts to keep 408 decision-making at the district level under ordinary circumstances. NWC believes that Corps districts are capable of competent review of most proposals, and their local knowledge is likely to yield a quicker and fuller understanding of any given proposal on local project assets. On the flip side, whenever elevation of a 408 review is necessary, that has the potential to add significantly to the time required. For example, NWC understands the draft circular’s provision to elevate requests that would “change how the USACE project will meet its authorized purpose” to the division or Headquarters. (¶13.c.(5)). On the other hand, three of the six categories of requests that currently require division review are arguably less significant (Paragraphs 13.c.(3), (4), and (6)). We would urge reasonable time limits, such as within 10 working days, particularly where the district has provided a complete file, and the reviewing office only needs to review the file and make its decision.

      - **Recommendation:** Set specific time limits for division reviews, particularly under Paragraphs 13.c.(3), (4) and (6).

   b. **Other Efficiency Issues.**

      NWC members are supportive of many other aspects of the proposed Circular intended to enhance the efficiency and timeliness of 408 reviews, including assigning a 408 Coordinator (¶ 7.b.); creating a 408 database (¶ 7.d.); funding monitoring and enforcement oversight (¶ 7.f.(3)); acceptance of funds to expedite reviews (¶ 7.g.(2)); and implementing multi-phase reviews (¶ 9.c.). We also provide following recommendations.
• **Recommendation**: Ensure that the Section 408 Coordinator (¶ 7.b.), the Section 408 Database (¶ 7.d.), and construction oversight (Paragraph (¶ 7.f.(3)) are adequately supported with appropriate staffing and funding.

• **Recommendation**: Insert language in Paragraph 7.g.(2) to ensure funds provided to expedite the Section 408 process are limited to the specific proposal to be funded and are not distributed to fund Section 408 requests more generally or other district functions.

Finally, requirements for a Quality Control Plan (QCP) (¶10.c.(4)) may be onerous and ill-suited to situations where professionally licensed engineers are responsible for the technical work supporting a proposal. It is more typical in the industry to retain a qualified, licensed, professional expert (engineer, geologist, etc.) and rely on their analysis than to invent and implement a peer review process. If a qualified, licensed, professional expert describes and certifies his or her process, that is sufficient.

• **Recommendation**: Revise Paragraph 10.c.(4) to allow, in the alternative, that requester may provide a certification by a licensed professional in the appropriate discipline.

Thank you for this opportunity to share our views. Please feel free to contact me if I may provide additional information.

Respectfully submitted,

Amy W. Larson, Esq.
President