



May 24, 2022

The Honorable Michael L. Connor
Assistant Secretary of the Army for Civil Works
108 Army Pentagon
Washington, 20310-0108

RE: Policy and Procedures for Processing Requests to Alter US Army Corps of Engineers Civil Works Projects Pursuant to 33 U.S.C. 408 (RIN # 0710-AB22)

Dear Secretary Connor:

On behalf of the National Waterways Conference (NWC), we are writing this letter in reference to the U.S. Army Corps of Engineers (Corps) posting of a regulatory plan on the Administration's Unified Agenda of Regulatory Actions entitled *Policy and Procedures for Processing Requests to Alter US Army Corps of Engineers Civil Works Projects Pursuant to 33 U.S.C. 408 (RIN # 0710-AB22)*. Under this plan, the Corps is proposing to convert its policy guidance (Engineer Circular 1165-2-220, hereinafter, "408 guidance") that governs the section 408 program to a binding regulation.

The section 408 program is especially important to the NWC's members, who represent a broad spectrum of non-Federal water resources stakeholders, including flood control agencies, levee boards, waterways shippers and carriers, industry and regional associations, hydropower producers, port authorities, shipyards, dredging contractors, regional water supply districts, farmers, engineering consultants, and state and local governments. Many of these members are non-Federal sponsors of Corps civil works projects, and are responsible for significant financial commitments for the construction and maintenance of civil works projects. Additionally, our members engage in activities that involve the proposed use or alteration of a civil works project that the Corps has constructed. Such proposed uses or alterations are subject to the prior approval of the Corps under the section 408 program.

While we support the underlying goal to provide more clarity to the Corps and non-Federal sponsors, we are concerned that the agency plans to utilize its Section 408 guidance as a basis for the proposed rule. In our experience, the Section 408 guidance has not been uniformly applied, or consistently and fairly implemented, across the nation.

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For example, many NWC members have pointed to concerns with the continuing long duration, and complexity of Corps 408 reviews; inconsistent review processes and prioritization of reviews; a lack of coordination internally within the Corps, with non-Federal sponsors, and with 408 requesters; piecemeal instead of comprehensive scope of reviews; uneven application of exemptions under the 408 guidance; varying retroactive application of changing 408 guidance; and the Corps' failure to create categorical permissions in order to expedite and streamline 408 reviews.

It is our recommendation that the Corps engage with stakeholders and non-Federal sponsors to get their advice and recommendations prior to the initial formulation of such regulation. These interactions will allow the Corps to first resolve these and other problems that non-Federal stakeholders are facing with the 408 guidance and its implementation.

The best way for the Corps to gain an understanding of stakeholders' concerns is to implement a transparent stakeholder consultation process that would include the issuance of an Advance Notice of Proposed Rulemaking (ANPRM) that informs potentially interested non-Federal stakeholders of the Corps' intent to develop and issue a rule; and provides an opportunity for interested non-Federal stakeholders to engage with, and provide input and recommendations to, the Corps on the development and issuance of such rule. This should include a robust public comment and engagement period of 120 days to provide input and recommendations to the Corps.

Afterwards, if the Corps continues to believe that developing a rule is appropriate, then the Corps needs to take into consideration the input, concerns, and recommendations received from non-Federal stakeholders when developing the proposal. The Corps should then publish the proposed rule in a Notice of Proposed Rulemaking that provides a detailed explanation of how the proposed rule addresses the input, concerns, and recommendations that the Corps received from non-Federal sponsors and stakeholders.

On the other hand, if the Corps no longer believes that it is necessary to develop a rule, then it should address the input, concerns, and recommendations received from non-Federal stakeholders by revising the 408 guidance.

NWC looks forward to working with you and the Corps in developing a more reasonable and transparent approach for implementing the section 408 program.

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If you have any questions, please do not hesitate to contact us.

Sincerely,



Julie A. Ufner
President and CEO
National Waterways Conference

cc: Chief of Engineers Lieutenant General Scott Spellmon
Jaime A. Pinkham, Principal Deputy Assistant Secretary of the Army for Civil Works
The Honorable Tom Carper, Chair, Senate Environment and Public Works Committee
The Honorable Shelley Moore Capito, Ranking Member, Senate Environment and Public Works Committee
The Honorable Ben Cardin, Chair, Subcommittee on Transportation and Infrastructure, Senate Environment and Public Works Committee
The Honorable Kevin Cramer, Ranking Member, Subcommittee on Transportation and Infrastructure, Senate Environment and Public Works Committee
The Honorable Peter DeFazio, Chair, House Transportation and Infrastructure Committee
The Honorable Sam Graves, Ranking Member, House Transportation and Infrastructure Committee
The Honorable Grace Napolitano, Chair, Subcommittee on Water Resources and Environment, House Transportation and Infrastructure Committee
The Honorable David Rouzer, Ranking Member, Subcommittee on Water Resources and Environment, House Transportation and Infrastructure Committee