



Submitted by Email to: HQ-Section408@usace.army.mil

September 20, 2022

Attention: Ms. Virginia Rynk
Section 408 Coordinator
U.S. Army Corps of Engineers
(Attn: CECW-EC)
441 G Street, NW
Washington, DC 20314

Re: Supplemental Stakeholder Engagement: Feedback from the National Waterways Conference on the Section 408 Program and Engineer Circular 1165-2-220

Dear Ms. Rynk:

On behalf of the National Waterways Conference (“NWC”), I am writing this letter to provide stakeholder feedback on the U.S. Army Corps of Engineers (“Corps”) Section 408 program and Engineer Circular 1165-2-220, as part of the Corps’ 408 program stakeholder engagement listening session series.

A. ABOUT THE NATIONAL WATERWAYS CONFERENCE.

The 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.

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

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significant financial commitments for the construction and maintenance of civil works projects. Additionally, many of our members engage in activities that involve the proposed use or alteration of a civil works project that the Corps has constructed.

B. BACKGROUND ON SECTION 408 REVIEWS AND PERMISSIONS.

Section 14 of the Rivers and Harbors Appropriation Act of 1899, as amended (codified in 33 USC §408; “Section 408”) provides that the Secretary of the Army may, upon the recommendation of the Chief of Engineers, grant permission to other entities for the permanent or temporary alteration or use of any Corps Civil Works project. A Section 408 permission requires a determination that the requested alteration is not injurious to the public interest and will not impair the usefulness of the project. The Corps has reviewed requests and issued permissions pursuant to Section 408 for navigation projects many decades, and more recently has begun using section 408 to also grant permissions to change congressionally authorized local flood protection projects.

In recent years, the Corps has adopted changes to the Section 408 program, including the development of guidance, ostensibly to address deficiencies in the program’s implementation and improve and hasten the Section 408 review and permission process. Some of the changes were driven by concerns that Congress had expressed about problems with the Corps’ implementation of the Section 408 program,¹ and by legislative amendments to the 408 program that were aimed at addressing these concerns enacted by Congress in recent Water Resources Development Acts (WRDAs).² The Corps’ Engineering Circular No. 1165-2-220 (“408 policy guidance”), issued in 2018, is the program’s current policy guidance and latest effort in this regard.

¹ Such concerns included the often long length of time to receive an approval of a modification or alteration of a Corps project by a non-Federal interest and therefore, the ongoing need to expedite the 408 certification process, and concerns about the multiple, and at times, duplicative analyses of the same activity. (*See, e.g.*, H.Rep. 113-246 (House Transportation & Infrastructure Committee Report to accompany the House WRRDA 2014 Bill, H.R. 3080); H.Rep. 114-785 (House Transportation & Infrastructure Committee Report to accompany the House WRDA 2016 Bill, H.R. 5303).)

² *See, e.g.*, Section 408, Subsections (b) (“Concurrent Review”) and (c) (“Timely Review”), which were added by Section 1156 of WRDA 2016. These subsections were aimed at trying to hasten Section 408 reviews and decisions. *See also* Section 408a (“Expediting Approval of Modifications and Alterations of Projects by Non-Federal Interests”), where Subsections (a) through (e) of Section 408a were added by Section 1007 of WRRDA 2014, and Subsections (f) and (g) were added by Section 1156 of WRDA 2016. Section 408a was aimed at trying to hasten Section 408 reviews and decisions, and to increase transparency of the Corps’ implementation of the 408 program.

C. THE CORPS' PROPOSED UNIFIED AGENDA ACTION ITEM.

The Corps has posted 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 408 policy guidance that governs the section 408 program to a binding regulation.

In advance of moving forward with this rulemaking, the Corps decided to conduct a series of virtual stakeholder engagement "listening sessions" during August and early September 2022 to receive "feedback from stakeholders who have an interest in the Section 408 program to better understand their experiences," which "will help the program make future adjustments and identify needs for tools and resources that support related practices." (See Corps Listening Sessions Briefing Sheet, USACE Section 408 Program Stakeholder Engagement Fact Sheet (Updated 24 Aug 2022).)

Stakeholders, including members of the public, were able to provide feedback during the listening sessions, and could also submit feedback through email to (HQ-Section408@usace.army.mil) by September 20, 2022. Among other things, the Corps solicited feedback on what is and is not working with the Section 408 program's processes and the procedures outlined in the program's Engineer Circular EC 1165-2-220, along with feedback on what is needed to improve the 408 process.

The NWC is submitting the following written comments in response to the Corps' request for stakeholder feedback. We appreciate this opportunity to share our views.

D. FEEDBACK ON "WHAT IS WORKING" WITH THE SECTION 408 PROGRAM.

NWC members have reported a number of improvements with the implementation of the Section 408 Program in some (but not necessarily all) Corps districts. These include:

- **Having a better, more clearly defined process** in place for requesting and processing 408 requests provided in the Section 408 policy guidance.

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- **Designating 408 coordinators in the districts**, to provide better access, help streamline communications, and facilitate the process.
- **“One-stop shopping” in Corps districts**, with district 408 coordinators being identifiable 408 program points of contact.
- **Greater ability to develop a rapport with Corps 408 staff**, making it easier to ask questions more comfortably and receive more individualized support.
- **Greater responsiveness of Corps 408 staff**, including more regular and frequent communications.
- **Increased staff resources provided in some districts** for processing 408 requests.
- **Keeping 408 decision-making at the district level** under ordinary circumstances, which often helps to yield a quicker and fuller understanding of local project proposals.

E. FEEDBACK ON “WHAT IS NOT WORKING” WITH THE SECTION 408 PROGRAM, CHALLENGES, AND NEEDED IMPROVEMENTS.

Despite attempts by Congress and the Corps itself to address deficiencies in the 408 program’s implementation, including in the latest 408 policy guidance (EC 1165-2-220), many in the stakeholder community who are impacted by the Section 408 program have continued to raise a number of issues with how the Corps has continued to fail at uniformly, consistently, and fairly implementing the 408 program and the latest 408 policy guidance around the nation. The Section 408 program, as now being implemented under the current 408 policy guidance, often remains burdensome and time-consuming, and has the potential to significantly delay projects, leading to an increase in risk for some projects, and cause resultant economic burdens with funding and grant obligations.

The comments below provide further details on what is not working with the Section 408 program, challenges that stakeholders are facing, and improvements that need to be implemented to the program.

1) The Continued Complexity of the Section 408 Approval Process Will Result in High Costs and Long Waits for Business and Industry.

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Notwithstanding the Corps' most recent Section 408 policy guidance, many stakeholders remain very concerned about "process" and complexity in the 408 program. Many believe the 408 "permissions" program has become run increasingly like a formal, more bureaucratic "permitting" program (e.g., such as the Section 10/Clean Water Act Section 404 permit program).

Recommendation: *The Corps needs to enhance the efficiency and timeliness of 408 reviews, including by providing adequate staffing and funding at the district level to facilitate faster 408 reviews.*

2) Many Corps Districts Do Not Have Adequate Staff Resources, and Therefore Have Limited Capacity to Timely Review Section 408 Permission Requests.

The Corps has largely failed to provide its districts with the adequate resources needed to timely review many 408 requests. The Corps' regulatory program has a budgeted line item to fund its regulatory reviews (including the Section 10 and CWA Section 404 programs), but the 408 program does not, even though most 408 reviews have become equally as complex, bureaucratic, and burdensome as the reviews handled by the regulatory program.

Recommendation: *Many stakeholders believe there is "no money for 408," and dedicated funding is needed for the 408 program (for example, a separate annual appropriations funding line for 408), or it needs to be easier for the non-Federal entity to pay for the 408 review. Funding in the districts should be commensurate with the workload of each district.*

3) The Corps Has Authority to Accept and Expend Funds to Expedite the Review and Evaluation of a Section 408 Request.

The Corps has authority to accept and expend funds to expedite the review and evaluation of a Section 408 request, and the districts have some flexibility in choosing the funding agreement option that is most appropriate to provide the most efficiency, but it appears that such option has not been made readily available and pursued in most 408 reviews.

Recommendation: *The Corps should make it easier for a non-Federal entity to pay for a 408 review. The Corps needs to ensure that 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 fund other district functions.

4) Because the Section 408 “Permissions” Program Has Become Much Like a Formal “Permit” Program, the 408 Program Should Provide Applicants with the Ability to Appeal 408 Decisions.

Because the Section 408 “permissions” program has become much like a formal “permit” program, many believe the 408 program should provide request applicants with the ability to administratively appeal decisions or to enact dispute resolution procedures for Section 408 requests, much like is provided for in other permit programs (*e.g.*, the Clean Water Act Section 404 permit program). Such appeals would include review of the determinations made related to the statutory standards requiring that proposed alterations must not be injurious to the public interest or impair the usefulness of the Corps project.

The Corps has claimed that the current 408 policy guidance includes numerous provisions “intended to be collaborative” with request applicants, and that it is the Corps’ “goal to resolve issues during the process versus creating new and separate processes.” (*See USACE Section 408 Policy – Engineer Circular 1165-2-220, Summary of Public Comments Received, at p.3.*) However, it appears that the Corps has failed to achieve such a goal of resolving issues during the process.

Recommendation: *The Corps should provide applicants with a meaningful appeal or dispute resolution process for the 408 program.*

5) Decentralizing Most Review and Approval Functions Under the Section 408 Program Has Led to a Lack of Consistency Between Districts in the Implementation of 408 Reviews.

Because many of the day-to-day review and approval functions under the Section 408 program have been decentralized by largely delegating them down to the Corps district level, this has led to a lack of consistency between districts in the implementation of 408 reviews. The Corps has largely failed to adequately track and audit its 408 decisions internally to examine whether Section 408 is being implemented consistently and fairly between districts across the Nation.

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Recommendation: *While it has been very helpful that most 408 reviews do not have to go to Corps-Headquarters, the Corps needs to do better by getting uniform guidance and implementation processes implemented down at the division and district level. This should include having the Corps-Headquarters 408 coordinator taking a more direct, active role in auditing the implementation of the 408 program in all of the divisions and districts, to help ensure consistency, and possibly providing 408 briefings or training, as needed, in the districts.*

Program consistency is very important, and so too is flexibility, as reviews relate to regions and facilities. Audits can evaluate commonality and recurrence for which a district or division level standard can be considered for application on an annual basis. The ability for districts to evaluate unique situations should be available.

6) Some Corps Districts Continue to Implement a 408-Like Process, Even if a Formal 408 Review Is Not Required.

Some Corps districts continue to implement a 408-like process, even if a formal 408 review is not required. Much of the problem seems to be at the district level, even if Corps - Headquarters is on-board with the changed processes.

Recommendation: *Again, the Corps needs to change the culture and practice in the districts and get uniform guidance and implementation processes implemented down at the division and district level. The Corps-Headquarters 408 coordinator should take a lead role in this.*

7) The Corps Does Not Consistently Prioritize 408 Reviews.

The Corps often does not consistently and fairly prioritize project reviews, which is a concern to many stakeholders. The Corps claims to have a “first-in, first out” process, but some Corps districts often prioritize their own desired proposals over non-Federal sponsors’ proposals, so the non-Federal sponsors often “don’t make it to the top of the pile.”

Recommendation: *Non-Federal partners on a project should be given a high priority, even as compared to third party non-Federal entities’ proposed activities. Additionally, non-Federal partners on a project should be able to approve third party non-Federal entities’ proposed activities.*

8) Internal Coordination Between Corps Programs During 408 Reviews Is Often Inadequate.

Many 408 reviews require close coordination between the Section 408 review process and other Corps regulatory review processes, but such coordination often is inadequate because the two programs are not adequately integrated in many districts, or they lack adequate resources.

Recommendation: There remains a need for improved coordination internally within the Corps, with non-Federal sponsors, and with requesters, even though the Corps acknowledges that coordination, both internally and externally, is a critical component of any Section 408 request and Section 408 coordinators must be adept at this skill. This includes the ability for requesters to have pre-application meetings with the Corps. The Corps claims that it has made a significant effort to improve coordination among and between its district offices, but it remains unclear why decision-making in these offices could not be better coordinated.

Section 408 requests need to be better handled by Corps personnel responsible for 408 reviews, and adequately coordinated or aligned with, the Corps' regulatory program. Also, as already noted, dedicated funding is needed for the 408 program (for example, a separate annual appropriations funding line for 408) and/or it needs to be made easier for the non-Federal entity to pay for the 408 review.

Similarly, many 408 reviews require close coordination between the Section 408 review people and the Corps' civil works construction people, but such coordination often is inadequate because these two programs also are not adequately coordinated in many districts.

The Corps needs to ensure that the Section 408 and construction oversight people are adequately supported with appropriate staffing and funding, and that they better coordinate with each other as necessary when conducting 408 reviews.

9) The Corps Is Internally Inconsistent in Determining When a 408 Review Is Versus Is Not Needed.

The Corps has been internally handling particular types of proposed activities inconsistently regarding whether there is a need for a 408 review, and the process for reviewing a proposed activity if a review is needed. The Corps typically takes a narrow scope of

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review of a project, instead of viewing it holistically and looking at the bigger picture, and focusing only on particular issues, as needed.

Recommendation: *The Corps needs to develop a consistent process that clarifies when a 408 review is and is not needed, and if so, provides for one single, comprehensive application review, whenever possible, that incorporates all conditions and requirements together in one permission, rather than incremental or piecemeal reviews.*

The type and extent of review of differing types or categories of proposed non-Federal activities subject to 408 should be tailored to the type of project.

An expedited and better integrated path of review should be allowed for certain activities, such as when exploratory or preliminary drilling/borings are involved in an alteration request. Some activities (e.g., where borings need to be approved first, so the borings data can be used for engineering design) should not be subjected to a segmented, two-step process.

10) The Corps Needs to Make Greater Use of Categorical Permissions and Exclusions to Improve 408 Program Efficiency.

Related to Comment 9, above, the Corps, in its current 408 guidance, has the ability to create categorical permissions in order to expedite and streamline the review and decisions of Section 408 requests that are similar in nature and that have similar impacts to a Corps project and the environment. The Corps also may develop categorical exclusions for circumstances when a review is not needed. Categorical permissions are similar to general permits, which are issued to authorize similar minor activities by one or more applicants. The Corps, however, has largely been slow to create categorical permissions (and categorical exclusions) in many districts to expedite and streamline 408 reviews.

The Corps (and also may other Federal and state agencies) has developed and widely utilizes similar tools for expediting and streamlining the reviews and decision-making in other permitting and approval programs it administers. Key examples include the Nationwide Permits program under Clean Water Act Section 404, and other general permits that Corps offices have established. Such general permits have been critical in expediting and streamlining the reviews and decisions of permit applications in those other programs, and categorical permissions (and categorical exclusions) can similarly be very helpful to the 408 program, too.

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Recommendation: *As already noted, the Corps needs to develop a consistent process that clarifies specifically when (under what circumstances or in what situations) a 408 review is and is not needed. As part of this, the Corps needs to expend additional effort in establishing district, division, and if appropriate national, level categorical permissions and exclusions, and develop additional guidance (and training, as needed) to aid district staff in implementing categorical permissions and exclusions. Categorical permissions provide an effective and efficient review process for alterations that are repetitive, regular, or standard in nature and generally relatively minor in scope.*

Categorical permissions for the 408 program could govern, among other things, typical operation and maintenance activities, including some project alterations proposed by a non-Federal sponsor; and specific requests for common projects, such as cultural reports, seepage analyses, scour analyses, biological opinions, biological assessments, and other common documents that will be required of applicants.

Other appropriate examples may be the many dock repairs, replacements, and expansions on a Federal navigational channel (such as the Mississippi River Ship Channel) that do not impact the navigation channel; and shoreline stabilization projects that occur adjacent to a Federal channel, but in shallow waters along the banks.³

The Corps also should consider exempting minor or temporary activities if they are part of an authorized project, and/or create a framework and standardized guidance for an expedited, streamlined, one-step review (essentially a “408-lite” process) for an activity. Minor activities, including many maintenance activities, have limited potential impacts and therefore should not be subjected to a burdensome full-scale 408 review. Many stakeholders have said that they have delayed much needed maintenance and other minor activities to structures because they could not afford the burdensome 408 process.

Further, the Corps should develop categorical permissions, categorical exclusions, and procedural review plans to address projects that are also governed by other, overlapping authorities, such as Section 10, Clean Water Act Section 404, and Nationwide and regional permits.

³ 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.

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In any event, to the extent a proposal is subject to Section 408 and the work recurs on a frequent or regular basis, a categorical permission would be appropriate and helpful, not only to the parties carrying out the activity, but also any state or local regulators, and the Corps' own district offices. The Corps needs to require its districts to make every effort to develop and utilize categorical permissions. Robust use of them can expedite and streamline the review and decisions of many Section 408 requests.

11) The Corps Needs to Ensure that the Requirements in Its Categorical Permissions and Other Regulations Are Consistent.

Some non-Federal stakeholders have expressed concerns about inconsistencies in the requirements that would apply to them under an applicable categorical permission as compared to those that would apply without an available categorical permission. For example, in one district, no degradable materials may be used to construct stairs, handrails, and similar structures on a levee if such alteration is approved under a categorical permission, but other Corps regulations *would* allow the use of degradable materials (such as pressure treated wood) for such structures if the categorical exclusion did not apply.

Recommendation: The Corps needs to ensure that its regulations are consistent and do not create inconsistencies for applicants when applying categorical permissions or other requirements under the 408 program.

12) The Corps Needs to Develop a Summary "Cliff Notes" Version of Its 408 Policy Guidance.

Some stakeholders believe the current 408 policy guidance is too long, detailed, and complicated, and internally inconsistent (at least in its application), which can lead to slower and inconsistent reviews.

Recommendation: The Corps needs to develop a shorter, more concise "Cliff Notes" version of its 408 Policy Guidance, which includes a summary and possibly checklists of the process and requirements for a 408 review. Such a summary version of the 408 Policy Guidance would be very helpful to applicants and their consultants in deciphering the various policy and procedural requirements for applying for a 408 review and the processing of a 408 request, thereby saving time and enabling applicants to prepare better quality applications upfront.

13) The 408 Policy on Corps-Run Projects Verses Sponsor-Run Projects is Different.

There is concern that the Corps often does not treat non-Federal sponsors as “partners” on projects. For example, the Corps often makes it difficult to advance projects the Corps is going to do anyway. The Corps does not impose the same requirements on themselves as they do on non-Federal sponsors who are doing work on a Corps project (e.g., when the non-Federal sponsors are providing the land, easements, rights-of-way, utility relocations, etc., within the real estate bounds of the project, or when they are doing work in advance/in place of the Corps).

The Corps seems to have two sets of rules—one that requires a 408 review if a non-Federal sponsor does the work, but that exempts the Corps from a review, even if the proposed work is the same. The Corps often requires non-Federal sponsors doing work on a project to seek 408 approvals for some of the non-Federal sponsors’ activities, even though they are part of the greater project.

The current 408 policy guidance discusses instances involving non-Federal construction of a water resources development project. Among other things, the guidance provides that Section 408 permission is not required in those cases where a non-Federal sponsor is undertaking work as an in-kind contribution on an authorized Corps project per an executed project partnership agreement that provides credit for such work, or where the proposed work has otherwise been authorized for construction.

Recommendation: *It appears there may be instances where the Corps is interpreting 408 policy guidance provisions very narrowly and is requiring a 408 review, even though the non-Federal sponsor is performing work for credit under an existing project agreement. Project work to be performed by non-Federal sponsors for credit under project partnership agreements should be exempt from 408 review.*

The Corps’ 408 policy guidance also contains an express exemption for maintenance and repair activities conducted by non-Federal sponsors on a Corps project for which they have operation and maintenance responsibilities, but may still require coordination with the Corps. 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. Section 408 review should not be required for ongoing activities contemplated under the prior approval.

14) The Corps Should Provide Some Flexibility When Considering a Temporary Limited Increase in Effects During Implementation of a Project.

In some circumstances, a proposed activity subject to Section 408 might create a temporary limited increase in effects during implementation of a project, before the overall project is completed (e.g., the work causing a temporary limited increase in base flood elevation in another area).

Recommendation: Some have proposed to allow for a proposed activity subject to Section 408 to create a temporary increase in effects during implementation of a project, before the overall project is completed, as long as the allowable level of temporary increase in effects would be limited, such as to a project's targeted design event level, a FEMA level, or some specified minimum default design event (e.g., a 100-year event), but not to an arbitrarily unrealistic level. Acceptable effects levels possibly could be tied to the design life or design effects level of a project.

15) Some Corps Districts Are Selectively Applying 408 to Past Projects in Retroactive Reviews.

Some Corps districts are selectively applying 408 to past projects, and are reviewing old projects to determine whether they were adequately reviewed under Section 408. The reviews may focus on whether existing structures are adequate (or not), and whether they have been working as intended.

Non-Federal parties are running into a problem involving a lack of documentation on many of these old, existing past projects. While some Corps districts have taken the approach that prior approved alterations are not subject to retroactive Section 408 review, others have not and are instead seeking to apply the current Section 408 review requirements and process to alterations made long before the Corps issued its first comprehensive Section 408 policy guidance in July 2014 (EC 1165-2-216).

Recommendation: Conducting such reviews has been less of a problem where there is adequate documentation for the old project alteration. In such circumstances, the Corps should accept past alterations or relocations as documented in as-constructed drawings or plan documents of as-built projects, or in applicable operation and maintenance manuals, or Corps

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inspection reports. However, when there is little or no documentation, there is more of a problem in conducting these reviews.

It is noted that, in addition to requiring that the Federal project not be impaired by the activity in question (i.e., no harm to the project), Section 408 also requires that the alteration be in the public interest, which in turn triggers a complex evaluation that includes an environmental review and more. For project activities made before the issuance of the Corps' July 2014 Section 408 policy guidance, allowing retroactive application of Section 408 to old project alterations means subjecting many of the owner-operators of those flood control works to a review process that will necessitate additional costs and time for the generation of new data, as past data on the project is often not available. This would necessitate the rather arbitrary manufacturing of new data for an old matter, since the past conditions and circumstances have long since passed and old information may not be available.

Prior to the Corps having issued guidance for processing Section 408 requests, changes to flood control works made by a non-Federal interest were regularly reviewed by the Corps pursuant to the Federal Flood Control Regulations (at 33 CFR 208.10). Those regulatory requirements resulted in a review that there would be no adverse impact to the project. Hence, a reasonable approach (particularly when there is little or no documentation for an old project) would be to specifically limit the retroactive application of Section 408 to those project activities made after the Corps first issued guidance in July 2014 for processing Section 408 requests. (This is when constructive notice for those review requirements under Section 408 was first made available to project owner/operators.) A provision like this would require the various Corps districts to consistently apply the same requirements, while still allowing for District level decision-making that considers regional concerns and the specifics of a particular project.

It also may be beneficial to provide acceptance of past alterations that are non-injurious while reviews are taking place. These exceptions can be noted and permitted within inspection reports and levee logs. The focus of the reviews should be geared toward injurious alterations and areas where operations and maintenance are not adequate to support the resiliency of the flood control project, and not simply on areas that may be unpermitted.

In any event, the Corps needs to develop clear, more consistent, reasonable guidance on how to deal with reviewing the, per se, approval of project alterations for legacy activities over the full range of retroactive review types, including the applicable standards under which such reviews are to be conducted and the sorts of documentation that may suffice for the reviews.

The Corps districts also need to be consistent with each other in what needs to be reviewed, and the districts' staff need to internally better coordinate together (e.g., between the 408 and civil works project people) on these past project reviews.

16) Section 408 Should Not Apply to Local Flood Protection Projects Authorized Under the Flood Control Acts.

The NWC is concerned that the Corps is expanding the reach of Section 408, which has long been a navigation authority under the Rivers and Harbors Act of 1899, to build a new regulatory construct for local flood protection projects maintained and operated by a non-Federal interest.

In general, alterations to a local flood protection project without Corps permission are not allowed, which is consistent with the Federal Flood Control Regulations (*see, e.g.*, 33 CFR 208.10). Since enactment of the Flood Control Acts more than a half century ago, the Corps has reviewed local sponsors' alterations to local flood protection projects in accordance with the Federal Flood Control Regulations. (*See id.*)

However, the Corps is expanding the reach of the Section 408 program to cover alterations to any Corps Federally authorized project, including those that have properly been covered under the Federal Flood Control Regulations. The review standard established by the Federal Flood Control Regulations determines whether the proposed alteration would adversely affect the project, while the Corps' Section 408 process goes beyond that to also consider whether the proposed alteration is in the public interest.

For example, the Corps' current draft update to its Levee Engineer Manual entitled "Evaluation, Design, and Construction of Levees" (EM 1110-2-1913) states that "Alterations to the project without USACE permission is not allowed. *Requestors of alterations to the levee project are required to follow the requirements of EC 1165-2-220, often referred to as the "Section 408 permitting process" when requesting alternations to any USACE federally authorized civil works project.*" (*See Levee Engineer Manual, Paragraph 12.13 ("Alterations")*(emphasis added).)

Such an approach is inconsistent with applicable law and implementing regulations (Federal Flood Control Regulations 33 CFR 208.10 and 209.220, 300), which allow for non-

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Federal sponsor improvement, excavation, construction, or alteration of a local flood protection project. Changing the interpretation of Section 408 to impose a burdensome regulatory program for local flood protection is a substantial change from existing law that goes far beyond the authority that Congress could reasonably be understood to have granted to the Corps. (See West Virginia v. EPA, 597 U.S. ____ (2022) (Under the “major questions doctrine,” “the agency must point to ‘clear congressional authorization’ for the authority it claims.”).)

The language of Section 408 makes clear that the Corps “may” (not “shall”) grant permission to alter a Federally built project. The Corps now considers Section 408 to be an ongoing means by which to change, without seeking approval from Congress, a Congressionally authorized project (*e.g.*, increase the level of protection, diminish the benefits, etc.). The NWC sees some utility in allowing that interpretation of Section 408, but we cannot accept that any alterations to a local flood protection project should undergo the time consuming and costly Section 408 review. This is especially true when the non-Federal interest seeks to make changes to the project that maintain its level of protection or that are within the duties and powers granted a non-Federal interest under state law.

Recommendation: *The use of Section 408 to review alterations to a local flood protection project rather than to continue adherence with the Federal Flood Control Regulations is a major action by the Corps that is “generation shifting.” Alterations to local flood control projects should be made pursuant to the Flood Control Acts and in accordance with the Federal Flood Control Regulations and the standard of review therein. If the Corps desires to expand the reach of the Section 408 program to review alterations to a local flood protection project using the two-prong standard therein ((1) be in the public interest, and (2) not harm the project), rather than abiding by the Federal Flood Control Regulations that non-Federal interests have long known to be the “deal” between the Corps and its local partner, the Corps must first receive that clear grant of authority from Congress.*

17) Federally Deauthorized Projects Should No Longer be Subject to Section 408.

Over the past several years, stakeholders have found the Corps to be unwilling to provide written confirmation that a flood control project which has been Federally deauthorized is removed from the authority of Section 408. It is incongruous for the Corps to say that Section 408 authority is triggered when a project becomes Federally authorized or constructed, but deauthorization does not delink it from Section 408 authority, or to allow

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ambiguity that opens the door for others to make that assertion. The Corps needs to clarify that Federally deauthorized projects are no longer subject to Section 408.

Recommendation: *Prior to seeking project deauthorization from Congress, owner/operators, upon request, should first be provided a written determination from the Corps that such deauthorization would result in Section 408 no longer applying to the project. This is especially important because, the language of Section 408 applies to works “built by the United States” and is not triggered by a project having been “authorized”.*

F. FEEDBACK ON CONCERNS WITH THE CORPS’ PROPOSAL FOR A SECTION 408 RULEMAKING.

1) The Corps Has Not Demonstrated a Need or Provided a Cogent Justification for Developing a “Binding” Section 408 Rule.

While the Unified Agenda posting notes that the Corps has legal authority over the section 408 program under 33 U.S.C. 408, the posting does not provide a clear rationale or demonstrate a need for a “binding” rule under Section 408, as compared to some other alternative such as improvements to the current 408 policy guidance. The posting says only that “The current Corps policy appears in an Engineer Circular that has expired,” and that “The next best alternative would involve issuing these requirements in the form of an Engineer Regulation. That alternative would not fulfill the intent of the law because it would not be binding on the regulated public.” That is not much of a justification for embarking on a whole new rulemaking.

Further, there is substantial concern over having the Corps move forward with a rulemaking to convert its 408 policy guidance to a “binding” regulation, considering that there are numerous outstanding issues and concerns with the Corps’ application and implementation of that current guidance. The Section 408 program, as now being implemented under the current 408 policy guidance, often remains burdensome and time-consuming, and has the potential to significantly delay projects and cause economic burden with funding and grant obligations, in part because many of the 408 process provisions that Congress wrote into Section 408 and the Corps added to the latest 408 policy guidance are not being adequately applied.

For example, many stakeholders have pointed to the continuing long timing, duration, and complexity of Corps 408 reviews; inconsistent review processes and prioritization of

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reviews; a lack of coordination internally within the Corps, with non-Federal sponsors, and with 408 requesters; piecemeal instead of a comprehensive scope of reviews; uneven application of exemptions under the 408 guidance; varying retroactive application of 408 guidance; and the Corps' failure to create categorical permissions or exclusions in order to expedite and streamline 408 reviews.

While the NWC agrees with and supports the underlying goal to provide more clarity to the Corps and non-Federal sponsors under the 408 program, we are concerned that a "binding" rule will not inherently address the fundamental problem with the 408 program—which is with the Corps' uneven implementation of the program. In our experience, the Corps has not uniformly applied or consistently and fairly implemented the 408 policy guidance across the nation, either internally within the Corps or externally with non-Federal entities.

Recommendation: NWC does not believe that a "binding" rule will, in and of itself, improve the Corps' implementation of the 408 program. Unless and until the Corps resolves the issues noted above and redoubles its efforts to ensure that necessary approvals under its Section 408 authority are carried out in an expeditious, transparent, and nationally uniform manner, consistent with Federal law, and that Corps 408 and other regulatory personnel are provided with sufficient Federal resources to carry out this authority, the problems within the 408 program will not be resolved, either under a "binding" rule or under guidance. Furthermore, should the Corps still seek to proceed with a rulemaking for Section 408, we would ask for their first to be published as an advance notice of proposed rulemaking wherein the Corps addresses the issues raised in these comments.

2) The Corps Is Improperly Certifying the Proposed Section 408 Rule Under the Regulatory Flexibility Act.

The Unified Agenda posting for the proposed Section 408 rulemaking states that small entities will *not* be affected, and that a regulatory flexibility analysis is *not* required under the Regulatory Flexibility Act (5 U.S.C. §601 et seq.)(“RFA”).

NWC believes that the Corps is improperly certifying the proposed 408 rulemaking under the RFA because the rule would likely have direct significant impacts on a substantial number of small entities. The Corps has failed to state a factual basis for its certification that the rule will not have a significant economic impact on a substantial number of small entities.

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Many stakeholders, including local levee or flood control districts, affected by the Section 408 program are small, local or regional government or other entities, which are considered “small entities” under the RFA who would be required to undertake 408 reviews. The proposed rule will impose costs directly on these small entities, and those costs will be significant for a substantial number of them.

Recommendation: Because the proposed rule will likely impose significant impacts on a substantial number of small entities, the Corps should hold the proposed rulemaking in abeyance for further development as the Corps considers alternative approaches for reducing impacts on small entities. This should include notification and outreach to small entities, conducting open meetings or public hearings concerning the rule for small entities, and soliciting and receiving comments over computer networks in accordance with the RFA prior to preparing anything further for a rule on this issue.

3) The Corps Needs to Ensure Sufficient Outreach to Stakeholders to Develop a Consensus Position on 408 Program Issues.

NWC is pleased that the Corps is engaging in stakeholder outreach on their experiences with the Section 408 program, through a series of virtual listening sessions and written email feedback. There is some concern, however, that the listening sessions are insufficiently focused for the Corps to get the type of specific, detailed feedback the Corps needs, first, to determine whether a rule is necessary, and if so, to develop an informed, consensus rule that will have the support of stakeholders. The listening sessions also have not focused on evaluating potential impacts to small entities or means for reducing such impacts.

Recommendation: To supplement the listening sessions, the Corps should take what it learned from the listening sessions and written email input and conduct a focused stakeholder consultation process with non-Federal stakeholders (particularly with stakeholders that have an interest in the 408 program, including small entities), to solicit advice and recommendations regarding ways to resolve the outstanding issues and concerns with the Corps’ implementation of the current 408 policy guidance.

This outreach could be conducted in conjunction with 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; solicits comment on relevant issues; 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.

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 (including small entities) and conduct a regulatory flexibility analysis of the impacts the rule would have on small entities, when developing the proposal. Then the Corps should publish the proposed rule and associated regulatory flexibility analysis in a Notice of Proposed Rulemaking, consistent with the Administrative Procedures Act, which 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 developing a rule is needed, then it should address the input, concerns, and recommendations received from non-Federal stakeholders by revising the 408 policy guidance.

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

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

Sincerely,



Julie A. Ufner
President and CEO
National Waterways Conference