



FLOOD PROTECTION TEAM

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OPTIMIZING USACE'S SECTION 408 DECISIONS

California's Capital Region sits at the confluence of two major river systems and includes the foothills and mountains that funnel flood water and much of the State's water supply. Flood security is critical to the economic stability and growth of our region and is only achieved through a streamlined process of making improvements to the levee system.

Requested Action:

The U.S. Army Corps of Engineers (Corps) is currently updating Engineering Circular (EC) 1165-2-214 which provides guidance for processing Section 408 requests for alteration of federally authorized projects. On November 10th 2016, the Corps issued interim guidance for the decision level of Section 408 permissions. The interim guidance included provision for delegating decisions for certain types of Section 408 requests previously made by Corps Headquarters to the Regional office and in effect may significantly reduce processing time for many such requests.

While the above mentioned interim guidance is a significant step forward in streamlining the Section 408 permission process, more clarity is needed in the policy update to ensure that the associated processes support realization of this streamlining. We are requesting active engagement with the Corps to consider revising the EC to clarify the roles of Regional and Headquarters' offices in complying with the National Environmental Policy Act (NEPA) and to also develop nationwide permits similar to the Corps' successful Clean Water Act Section 404 process.

Background:

Provided in Section 14 of the Rivers and Harbors Act of 1899, and codified in 33 USC 408 (Section 408), the Secretary of the Army has authority to grant permission for a non-federal

interest (requester) to alter a federally authorized project (i.e. dams, navigational channels, levees, and any other local flood protection works constructed by Corps) if it does not impair usefulness of the project and it is not injurious to the public interest. Permission for such alterations is made at either at the District, Regional, or Headquarters level depending on the type of alteration. A Section 408 decision is a federal action and requires NEPA and other environmental compliance and where applicable a requester may leverage existing NEPA documentation.

The Corps recently revised the decision level for Section 408 requests in a memorandum dated November 10, 2016. This memorandum significantly streamlined the permitting process, but failed to specifically address how the new decision levels affect Regional and Headquarters roles' in complying with NEPA.

The Corps is updating their policies and procedures for processing Section 408 requests (EC 1165-2-216) in order to: improve consistency in the way the Corps considers, processes, and documents decisions regarding requests for alterations to federally authorized projects; create a process that is applicable to all types of requests; offer transparency on required information; and fosters a process that can be tailored by Districts to the appropriate scope, scale, and complexity of the proposed alteration.

Need for Reform:

Given the current budgetary environment, it is unlikely that the Corps will be able to undertake all necessary critical improvements to federal facilities around the country soon. Therefore, non-federal interests nationwide are currently undertaking critical improvements to federal facilities that cannot or are not being implemented by the Corps due to unavailable funding. These locally-led undertakings are burdened by complex and lengthy permitting processes. While the interim guidance is a significant step forward in streamlining the Section 408 permitting process, more clarity is needed in the new policy to ensure that associated processes support realization of this streamlining.

In addition, the EC 1165-2-216 encourages streamlined NEPA compliance (e.g., evaluating only the no-action and requestor's preferred action and use of categorical exemptions). Corps Headquarters should assist in such streamlining through the development of nationwide permits, similar to those used for Section 404 of the Clean Water Act. This would not only improve consistency across the Districts and Regions but would also alleviate burden on the Districts which may be processing hundreds of these. There is no specific funding for the Corps in processing Section 408 requests, resulting in locally led infrastructure projects that require Section 408 permission to be de-prioritized within the Corps and unnecessarily delayed because the Corps does not have the funding capability for processing.

Concerning NEPA compliance, we request that the Corps consider revising the EC 1165-2-216 to clarify the roles of Regional and Headquarters' offices when the decision level is at and below respective levels. This would ensure unnecessary layers of review do not occur, resulting in loss of construction seasons and prolonged flood risk because levee improvements are delayed. Currently, the requirement places NEPA compliance at the District however, the Regions are requesting to review of NEPA documents prior to their release which is delaying public review by several weeks and thus causing a corresponding delay in Section

408 permitting. At most, the review of NEPA documents by Regional offices should only be required when the decision level is at the Regional office. This review should be concurrent with public review for the sole purpose of considering the public's views.

The guidance should specify that the District prioritize work flow by risk reduction, not the project implementer. In California, Section 408 requests are often for large strategic projects that should not take a backseat to Civil Works projects simply because someone other than the Corps is performing the work. As such, the guidance should direct the District to use existing NEPA and other environmental and cultural documentation, in particular, from a Civil Works study when that federal study includes the requested 408 action.

Furthermore, in the case where the delegation of authority is in the District, the Region shall comply with the existing policy and not be required to be a part of any of the NEPA compliance. For the smaller permit decisions (i.e., seepage berms) that are currently at the District Engineer (DE) level, we recommend that the Assistant Secretary of the Army for Civil Works further delegate the DE' authority to a designee in the District. This will save at least six weeks in the District decision-making process by eliminating the interoffice routing for the DE's signature.

Finally, the updated policy should reflect that the legal review is only required for the DE or Region approvals and that the legal review is not needed for delegated District staff approval. This will save an additional two weeks.