



National Association of Flood & Stormwater Management Agencies

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**Subject: Comments in Response to Draft Engineering Circular 1165-2-220
Section 408 Permission Requests to Alter USACE Civil Works Projects**

NAFSMA is a local and regional public agency driven organization based in the nation's capital, with a focus on effective flood, floodplain and stormwater management in urban areas. The association's mission for 40 years has been to advocate for public policy and encourage technologies in watershed management that focus on flood protection, and stormwater and floodplain management.

Many of NAFSMA's members are partners on flood damage reduction and environmental restoration projects with the U.S. Army Corps of Engineers (USACE) and the association has signed a memorandum of agreement on green infrastructure with the U.S. Environmental Protection Agency (EPA) and a partnership memorandum of understanding with the U.S. Army Corps of Engineers.

NAFSMA members are on the front line, protecting their communities and regions from flood hazards that can result in loss of life and property. They are responsible for flood mitigation, stormwater and emergency activities, as well as water quality protection.

NAFSMA has become increasingly concerned about the USACE approach to approving modifications and alterations of USACE-partnered projects over the last ten years. For decades, many non-federal sponsors and USACE Districts had been successfully managing alterations to federal projects prior to the agency's move to utilize Section 408 for some modifications following Hurricane Katrina (beginning with the October 23, 2006 memorandum from the Director of Civil Works.) Although there have been efforts to clarify the approach in recent years, the use of Section 408 has become more burdensome, costly and confusing to non-federal sponsors, and possibly to Corps District and Division staff as well. NAFSMA urges USACE to strongly consider the association's recommendations as an important step to help clarify outstanding questions and concerns.

NAFSMA appreciates the opportunity to provide input on the development of a new draft Engineering Circular (EC) to clarify the implementation of Section 408 (EC 1165-2-220). NAFSMA also appreciates the multiple briefing webinars with non-federal partners and stakeholders, the 60 day comment period, and the helpful information provided in the appendices to the EC.

Role of Non-Federal Sponsor

The non-federal, or local sponsor, plays an important role in 408 determinations. Many of NAFSMA's members review all applications that may impact a federal project that they own and operate, make determinations, coordinate with the appropriate USACE District to obtain their acceptance, and then issue permission to the applicant. Since the non-federal sponsor owns, operates and maintains the flood control facility, they have the highest motivation to protect it and own the consequences of each 408 determination.

In many places the new EC recognizes and reinforces this role. There are, however, a few places where the EC inappropriately diminishes the role and authority of the non-federal sponsor. Many of the comments and recommended revisions below reflect this concern.

Permit vs. Permission

During the webinars hosted by USACE and NAFSMA on the new draft EC, it was stated that the terms permission and permit are synonymous. Several NAFSMA members have raised concerns about this interpretation and we believe there is definitely a distinction between the two terms in practice for two reasons. First, USACE has in the past made a distinction between regulatory Section 404 permits and the Section 408 permissions. Local communities and USACE District offices are familiar with the distinction so the terminology should continue to avoid unnecessary confusion.

Second, in many cases, the non-federal sponsor is the permitting agency on a locally owned and operated project for an activity that might be carried out by another entity. If Section 408 permission is needed to alter a federal project, the permitting agency, not USACE, would have the responsibility for reviewing the applications, inspection and quality control of the project during construction. In this situation, USACE would provide oversight of the permitting agency. Further, because the non-federal sponsor is the permitting agency, criteria and requirements of the non-federal sponsor should be allowed and only modified as necessary with special conditions to satisfy any extra USACE requirements.

Training

NAFSMA recommends that USACE, working through a non-federal sponsor organization(s) hold regional joint training on the new EC that includes both USACE staff from the District and Division levels, as well as non-federal sponsors and potential non-federal sponsors. In particular, District Commanders and the new leads for Section 408 in the Districts and Divisions need to understand the process and the limits of their authorities for reviewing and providing Section 408 permissions. NAFSMA is ready and willing to assist in this effort and has worked with USACE in the past to carry out such joint training opportunities.

Section Specific Comments Purpose – Section 1.

Clarify if Section 408 permission is required for proposed alterations in USACE owned, operated, and maintained projects. That is, federal projects where there is no non-federal sponsor or where the non-federal sponsor has no Operations, Maintenance, Repair, Replacement and Rehabilitation (OMRR&R) responsibilities.

Basic Definitions – 6.d. “Requester”

Add this language (similar to EC 1165-2-216) at the end of the definition:

(Note: New text is underlined and deleted text is struck-through throughout comments)

“An independent requester must have a letter of no objection from the non-federal sponsor prior to a written request being submitted to USACE.”

Also, throughout EC 1165-2-216 when references are made to “the requester and/or non- federal sponsor, if applicable”, say “the non-federal sponsor and independent requester, if applicable” because in all cases the non-federal sponsor will be involved and an independent requester will only be involved if they are the applicant.

Designation of USACE Section 408 Coordinators – Section 7.b.

NAFSMA supports the designation of new Section 408 coordinators at the District and Division levels as well as recent USACE initiatives to move the approval process for such requests away from Headquarters. To insure timely responses and coordination, NAFSMA also recommends an alternate at the Districts and Divisions be designated, as well.

NAFSMA also supports the addition of a Section 408 position at Headquarters to provide leadership, direction, training, and decisions during the new Section 408 implementation.

Funding to Process Section 408 Requests – Section 7.f.

Move this language up from paragraph 10 as Section 7.f.3. where it is more appropriate: “Districts will make it clear to requesters that all costs associated with information required for obtaining a Section 408 permission, constructing the alteration (if approved), and complying with any conditions associated with the Section 408 permission is at 100 percent cost to the requester. The funding agreements in paragraph 7.g. are for the USACE costs to coordinate, review, evaluate, and make a decision regarding the Section 408 permission.”

Coordination – 7.h.(1) and 7.h.(2)

In both paragraphs insert “and timely” after “effective” to emphasize that timely reviews and decisions are very important.

Concurrent Review of Section 408 Permissions and Section 404 Permits – Section 7.h (3) This section in the new draft guidance allows for Sections 408 and 404 to be completed concurrently, but requires that the Section 408 decision be rendered before or concurrently with the regulatory 404 permit decision. It is not clear why Section 404 permits could not be completed first since Section 408 permissions require an environmental review as part of the process. If it were possible to combine the 408 permission with the 404 permit process, this would reduce or avoid multiple decisions where a non-federal sponsor may be dealing with multiple Districts because Section 404 permits may be handled by a different District than the one handling 408 requests. For example, in southern Nevada, 408 permissions are handled by the Los Angeles District and Section 404 permits are issued by the Sacramento District.

Coordination – 7.h.(7) and 7.h.(9)

Move the following paragraphs behind Section 7.h (1) because they fit better chronologically.

“Districts will provide a copy of this EC to non-federal sponsors of USACE projects. Districts should work with non-federal sponsors to establish processes for coordination related to procedures and requirements in this EC.”

“Vertical coordination among district, division, and HQUSACE must be done when there is any question related to the appropriate course of action; the nature of the Section 408 request is without precedent; or the review of the Section 408 request requires deviation from policy.”

Alternations Outside the Project Limits – Section 8.a.(4)

Since non-federal sponsors are responsible for OMRR&R, they must be included in the coordination with the USACE. Add the phrase shown below.

“This EC should not be applied to proposed alterations occurring outside of the areas specified in paragraphs 8.a.(1) to 8.a.(3). If there is a case in which the proposed alteration occurring outside of the areas specified could impair the usefulness of a USACE project, coordinate such cases with the non-federal sponsor and vertically through the appropriate integration team.”

Emergency Alterations – Section 8.b.

NAFSMA supports this language stating that “Emergency alterations performed on USACE projects pursuant to Public Law (PL) 84-99, reference A.27, do not require Section 408 permission.” Add language directing “USACE to take into account that consequences of some emergency conditions post disaster may last for several years and that these conditions may warrant expedited processes past the emergency declaration. (Example - burnt watershed conditions following wildfires).”

Operations and Maintenance Activities – Section 8.c.(1, 2 and 3)

NAFSMA supports this language clarifying the allowance for operations, maintenance and repair activities to be carried out without a Section 408 permission. This is an issue that definitely needs to be highlighted in regional training activities to USACE District and Division staff and non-federal sponsors.

NAFSMA does recommend that Section 8.c (1) be revised to clarify that repairs and rehabilitation are included and to acknowledge that non-federal sponsors and Districts do coordinate some OMRR&R activities and should continue.

~~“Operations and Maintenance (O&M) Operations, Maintenance, Repair, Replacement, and Rehabilitation (OMRR&R) activities including but not limited to those specified in the O&M manual provided at project turnover do not require Section 408 permission. nor USACE district coordination or concurrence unless specified by the USACE District.”~~

NAFSMA also recommends that Section 8.c (3) be revised to clarify that repairs and rehabilitation are included, as well.

“Geotechnical exploration drilling by the non-federal sponsor that is needed for the purposes of their ~~operation and maintenance~~ OMRR&R responsibilities (such as for the design of a repair) does not require Section 408 permission...”

Section 204 of WRDA 1986 ASA(CW) Approval – Section 8.f.(4)

The ASA(CW) does not approve construction plans. Change “construction plan” to “recommended plan”.

Categorical Permissions – Section 9.a.

NAFSMA fully supports the establishment of Categorical Permissions. However, they need to be established in coordination with non-federal sponsors. Add the phrase shown below.

“The district, division, and/or HQUSACE have the ability to create a “categorical permission” in coordination with the non-Federal Sponsor in order to 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 environment.”

Multi-Phased Reviews – Section 9.c and 9.c.(2)

Coordination with the non-federal sponsor and independent requestor is critical. Edits to select sentences are shown below:

“This will require the district, non-federal sponsor, and the independent requestor, ~~and non-federal sponsor~~, if applicable, to establish pre-determined milestones at which the requester will submit varying information to the district. The district will review the information at each milestone to identify any concerns and will coordinate with the requester accordingly. Based on the information provided at each milestone and coordination with the non-Federal sponsor and independent requestor, if applicable during the review, the district will provide a written response providing feedback and a determination as to whether or not the requester can proceed to the next milestone.”

~~“For the multi-phased review approach,~~ In coordination with the non-Federal Sponsor and independent requestor, if applicable, the district must develop an alteration-specific review plan for the complete alteration, reference paragraph 11.c., and are encouraged to initiate development of the review plan, as soon as possible, ...”

Basic Requirements for a Complete Section 408 Request – Section 10

See recommended changes below to include single phase reviews, role of the non-federal sponsor, and edits. As previously stated, NAFSMA recommends the first sentence regarding funding be moved into Section 7.f.

~~“All costs associated with information required for obtaining a Section 408 permission, constructing the alteration if approved, and complying with any conditions associated with the Section 408 permission is at 100 percent cost to the requester. If submitting information for a categorical permission, reference process in Appendix C. If the single phase review approach is used, then the information needed for a complete Section 408 request is recommended upfront with early coordination with the non-Federal Sponsor and District, if necessary. If the multi-phased review approach is used, then the information needed for a complete Section 408 request may be provided at different milestones for review. Because proposed alterations vary in size, level of complexity, and potential impacts, scale the procedures and required information accordingly to make ~~such a the~~ determination ~~are intended to be~~ scalable.”~~

Requirements for data, analyses, and documentation ~~may be~~ are subject to change as additional information about the Section 408 proposal is developed and reviewed. ~~Determination for The District in coordination with the non-Federal Sponsor determine~~ the required information for each Section 408 submittal ~~is led by the district. ...”~~

Statement of No Objection – Section 10.a.

NAFSMA believes USACE has a vested interest in ensuring that the non-federal sponsor continues to be able to operate and maintain the USACE project. Many non-federal sponsors may not have the ability or financial means to handle any increased operation and maintenance costs or regulatory burdens that may result from the third party’s proposed modification. Therefore, no 408 decisions should result in increasing such burdens on non- federal sponsors.

A good list of reasons is provided for including the non-federal sponsor, but an important one was left out. Include addition in the second sentence of the paragraph.

~~“For USACE projects with a non-federal sponsor, Prior to the District initiating the review, a~~ written “Statement of No Objection” from the non-federal sponsor is required if the requester is not the non-federal sponsor. Non-federal sponsors typically have operation and maintenance responsibilities; have practical experience and understanding of the performance of the USACE project; have a cost-share investment in the USACE project; and/or hold the real estate interest for the USACE project.”

Statement of No Objection – Section 10.a.(4)

NAFSMA recommends this section be deleted in its entirety. This situation is rare and as currently written, this section creates confusion.

Often third party entities with eminent domain authorities have missions that are different or even conflict with, those of the non-federal sponsors, which often also have eminent domain authority. Court proceedings will need to determine which entity has the overriding land use. In the event the third party entity prevails over the non-federal sponsor in taking its property, the court decision will likely require the third party to compensate the non-federal sponsor. Therefore, no 408 decision should be made by USACE on a third party request until a letter of no objection has been provided by the non-federal sponsor and the third party entity has successfully completed its eminent domain action, including compensation, to obtain the proposed land use.

NAFSMA understands that USACE needs to resolve third party requests in a timely manner in situations where non-federal sponsors are non-responsive. NAFSMA recommends this section include provisions that USACE can proceed without the non-federal sponsor only in circumstances where the independent requestor has obtained the real estate interests necessary to undertake the alteration. NAFSMA also recognizes that there may be extenuating circumstances, such as emergencies, where the non-federal sponsor is unable to respond within the proposed 30-day deadline. NAFSMA recommends this section include provisions to extend the deadline when circumstances warrant.

Statement of No Objection – Section 10.b.

Typically, more information is needed than listed. See edits below:

“USACE Project and Alteration Description. Basic requirements for a complete Section 408

submittal include identification of the USACE project and a complete description of the proposed alteration(s) including necessary drawings, sketches, maps, and plans, as well as engineering, technical, and design analysis reports, etc.”

Quality Control Plan – Section 10.c.(4) NAFSMA recommends that this section be deleted. Non-federal sponsors recognize the challenge of receiving good quality review materials from applicants and professional engineers. However, experience has shown USACE required Quality Control Plans have not been sufficiently effective to warrant this requirement. Requiring a Quality Control Plan when alterations involve professional engineering design services, including a requirement for the plan to include details of approach to the design and peer review procedures, adds a new layer of complexity to the permission process and brings little value to a project.

Safety Assurance Review – Section 10.c.(5)

NAFSMA recommends that this section be written to ensure that decisions on the need for a SAR are made at the District level and on a case by case basis with input from the non-federal sponsor and that District staff be trained accordingly. NAFSMA also recommends Districts consider circumstances in which requestors are already required to have their alterations undergo review by regulatory entities with robust engineering review processes and possess the multi-disciplinary expertise necessary to ensure that safety plans satisfy or exceed federal SAR requirements. NAFSA believes the determination of the need for a SAR must be made as early as possible in the process to give the requester adequate time to complete this requirement.

Real Estate Requirements – Section 10.e.

Recommended edit:

“A list of all real property interests required to support the proposed alteration must be provided. Maps clearly depicting both existing real estate rights and the additional real estate required must also be provided. Non-federal sponsors granting real property interests for alterations undertaken by third parties shall ensure that the terms of the grant are consistent with the standard and any special conditions of the Section 408 permission. If a non-standard estate is proposed for an alteration that will be integral to the functioning of the USACE project, the district must follow the normal approval requirements outlined in reference A.26. ~~Maps clearly depicting both existing real estate rights and the additional real estate required must also be provided.~~”

USACE Review Requirements – Section 11

Section 11.a.(1) – Impacts to the Usefulness of the USACE Project

A few additions based on experience to improve the clarity of this well written section.

“Impacts to the Usefulness of the USACE Project. The objective of this determination is to ensure that the proposed alteration will not limit the ability of the USACE project to function as authorized and will not compromise or change any authorized project conditions, priorities, purposes or outputs. All appropriate technical analyses including geotechnical, structural, hydraulic and hydrologic, real estate, construction, and operations and maintenance requirements, must be conducted and the technical adequacy of the design must be reviewed. If at any time it is concluded that the usefulness of the authorized project will be negatively

impacted, any further evaluation should be terminated and the requester notified. No granting of Section 408 permission is allowed for a proposed alteration that would have an effect of deauthorizing a project, reducing or eliminating an authorized project purpose, or changing the priorities of an authorized project.”

Section 11.a.(2) – Injurious to the Public Interest

Principles are clear but hard to understand how to apply to actual proposed alternations. Suggest being more direct. Some of the factors to consider are valid and clear, but some are not. Suggest adding adjectives.

The example provided that would not likely be permitted is good, but more examples are needed. NAFSMA recommends adding the following types commonly seen by non-federal sponsors: “would limit access for maintenance operations; reduce structural integrity of levees, dams, channel side slopes, or hydraulic structures; or increase the exposure to flood risk of occupied structures or critical facilities.”

Section 11.b. – NAFSMA recommends limiting the scope of applications that require public notice. As currently written, this section requires public notice for all requests, except categorical permissions. This will greatly increase the cost and review time for all applications.

Section 11.c. – Experience has shown that this can take several weeks to a few months. Edit the first sentence to read: “The review of each Section 408 request will be conducted in conjunction with a review plan which the District must prepare in 2 weeks or less.”

Section 11.c.(2) – The first sentence should read: “Districts ~~have the option~~ are to develop an overarching review plan to minimize actual review times, called a Procedural Review Plan, that establishes the review procedures to be used for Section 408 requests similar in nature and that have similar impacts and do not require a Safety Assurance Review (SAR), reference paragraph 11.c.(4).”

Notification, Coordination, and Review Timelines - Section 12.

Recommended changes are as follows:

“All information submitted by the requesters should be transmitted to the appropriate USACE district office having jurisdiction over the USACE project being altered as well as the nonfederal sponsor if not the requester with a cover letter signed by the entity requesting the Section 408 permission. USACE will coordinate closely with the non-federal sponsor and independent requester, if applicable and provide timely responses ~~requesters~~ no matter the type of Section 408 request or the stage of the review. Regardless of the type of Section 408 request or information submitted, districts are expected to provide a response to non-federal sponsors and independent requesters, if applicable within 30 days of receipt of information. Template letters are found in Appendix J.”

Section 12.a. – Need to add in last sentence: “The district will evaluate each submittal of information, including the recommendations from the non-federal sponsor and independent

requester, if applicable, and determine one of the following: ...”

Section 12.a.(6) and (7) – Move these two sections covering single phase reviews after Section 12.a.(2) covering categorical permissions. Logical order is categorical permission, single phase review, and then multi-phased reviews.

Section 12.b – Recommend specifying time for each type of review as shown in the recommended language below:

“A final Section 408 decision will be provided by USACE to the requester as soon as possible, but at least within 30 days for a categorical permission, 60 days for a single phase review, and within 90 days for a multi-phase review from the date the completeness determination was made by the district, unless one of the following stipulations apply.”

Summary of Findings – Section 14

Section 14.e. and 14.f. – Exclude the certifications for each categorical permission application and state when these certifications are required. In other words, they are not required unless certain conditions exist. Based on prior experience, certifications from the Office of Counsel and Chief of the District Real Estate Division have the potential of adding weeks or months to the final decision.

Add Section 14.i. – USACE and non-federal sponsor accountability is important to document.

“A summary of the review and decision timeframes by each USACE office, confirmation if review timeframe goals were met or not, and reasons for delays. Include timeframes and delays attributed to the non-federal sponsor and/or independent requester.”

Oversight, As-Builts – Section 16.b.

Edit as shown:

“Plans and specifications with amendments during construction showing alterations as finally constructed will be furnished by the Section 408 requester to the District and non-federal sponsor after completion of the work. As-builts must be provided within 180 days of construction completion.”

Appendix C – Categorical Permissions

C-3.d. – Recommend changes to ensure involvement of the non-federal sponsor are:

“Potential categorical permissions ~~should~~ must be coordinated with those non-federal sponsors with responsibility for the USACE projects that would be covered. Non-federal sponsors should be given the opportunity to submit potential categorical permissions or provide input on all aspects of the proposed categorical permission, with specific attention to concerns regarding impacts on their OMRR&R responsibilities and public interest considerations. There should be consideration of potential disqualifying circumstances that could address issues associated with the non-federal sponsor OMRR&R responsibility. For example, a categorical permission can include as a disqualifying circumstance the requirement that the requester, if not the non-federal sponsor, secure a statement of no-objection from the non-federal sponsor indicating that the non-federal sponsor would provide the required property interest to allow the alteration to occur before the

validation of the applicability of the categorical permission.”

The example provided in the last sentence is an unusual and rare occurrence. Recommend providing realistic examples.

C-4.b. – Is this the only standard term and condition from Appendix K that applies? If not, need to say the other ones that apply, as well. (See also C-5.a.)

C-4.c.(4) – Strike “an otherwise in-scope” - appears to be a typo.

C-4.c.(7) – What does this mean? - “an appropriate period of validity for the categorical permission, if appropriate; and”

Appendix E – Dams and Levees

There are excellent lists of potential considerations, information, and analysis in this appendix. There is no appendix for open channels, a common type of USACE flood risk management infrastructure. NAFSMA recommends including it either in Appendix E or separate appendix and that NAFSMA help in its development since open channels are different than dams and levees. Appendix D in EC 1165-2-216 included channels and would be a good reference.

Appendix I – Funding Agreements

I-3.g.(4) – To improve accountability, add the following requirement that was in EC 1165-2-216: “within 30 calendar days of the conclusion of each fiscal year ... a letter from the funding entity detailing its level of satisfaction with the district's performance under the MOA.”

In the annual reports for each of the funding agreement types, include a list of times to process and make decision for each permission granted or denied.

Appendix J – Template Letters

Recommendations for improvements to the template letters are:

On each letter just below the Section 408 Request Number in the subject line, add a short description of the subject of the letter such as Submittal Complete, Submittal Incomplete, Decision Delayed, Permission Granted, Permission Denied, etc.

On the Submittal Complete letter, leave the number of days for a decision blank for the District to fill in rather than use 90 for every submittal. Need to encourage quicker decisions when possible.

On Decision Delay Letter, state why the decision was delayed such as work load, attorney needs more time, key reviewer on vacation or in training class, etc.

On Final Decision Letter that grants permission, need to reference the Standard Terms and Conditions attached and the special conditions attached, if any.

Instructions in EC referred to bold face language in letter templates that should not be modified or deleted, but none was in bold face.

Appendix K – Standard Terms and Conditions

Limitations of Authorization 4. – What does “future operations by the United States” mean? The USACE doesn’t operate or maintain the FRM federal projects. Does it mean future modifications or work performed by USACE?

Indemnification and Hold Harmless 6. – Many non-federal sponsors cannot agree to this per State law. Recommend including language similar to what is used in project partnerships agreements developed by USACE for these particular states.

NAFSMA very much appreciates the opportunity to comment on this important document. Please feel free to contact Executive Director Susan Gilson at sgilson@nafsma.org or 202-289-8625 with any questions.

Sincerely-

Steve Fitzgerald
President

Susan Gilson
Executive Director