



State of Louisiana

JOHN BEL EDWARDS
GOVERNOR

April 6, 2018

Mr. James C. Dalton
Director of Civil Works
Headquarters
U.S. Army Corps of Engineers
Attn: CECW-CE/3E62
441 G Street N.W.
Washington, DC 20314-1000

RE: Docket Number COE-2018-0003 (EC 1165-2-220 Comments).

Dear Mr. Dalton:

On February 5, 2018, the United States Army, Corps of Engineers (USACE) published a request for comment on a proposed Engineer Circular (EC) 1165-2-220 (the "Draft EC") related to how USACE will process certain requests by others to alter a USACE civil works project pursuant to Section 14 of the Rivers and Harbors Act of 1899 (more commonly referred to as Section 408). The State of Louisiana, through the Coastal Protection and Restoration Authority (CPRA), appreciates the opportunity to comment on the Draft EC and submits the following comments.

Introduction

CPRA is the Louisiana state agency responsible for administering the programs of the CPRA Board, which sets the policy for the state's coastal program through the state's Coastal Master Plan. Accordingly, CPRA is the single state agency responsible for implementing projects relative to the protection, conservation, enhancement and restoration of the coastal area of the state through oversight of integrated coastal projects and programs consistent with the legislative intent expressed in La. R.S. 49:214.1. In this role, CPRA routinely works with USACE and appreciates USACE's efforts to develop federal-level efficiencies to the process for requesting alterations to civil works projects pursuant to 33 U.S.C. 408, as well as the opportunity to comment on the Draft EC for 408 alteration requests. CPRA's comments are below.

Comments

CPRA respectfully submits the following comments to the Draft EC.

CPRA requests clarification in the Draft EC to reflect USACE's stated intention that removal of the 60% plans and specifications minimum requirement for conditional 408 approvals means that conditional approval may be granted by districts at less than 60% plans and specifications rather than more than 60%.

Under the previous 408 guidance, which the recent Draft EC replaces, the district was required to “work closely with the requester to determine the specific level of detail necessary to make a decision for a particular alteration request.”¹ Additionally, under the previous guidance, the *minimum* level of detail required of a requester to make a particular alteration request was 60% complete plans and specifications and supporting technical analysis.² Under the new Draft EC, while the district and requester are still required to work closely together “to determine the specific level of detail necessary to be provided in order for USACE to make a decision for a particular alteration request”, the 60% minimum requirement was removed.³ In fact, the USACE indicated that removal of the 60% design requirement was sufficiently important that this new policy was included in the USACE’s Section 408 – Interim Changes for Immediate Implementation and Future Policy Revisions issued on January 12, 2018 (Interim 408 Policy Directive), which was published eleven days before the Draft EC was issued for public comment.

While removal of the 60% minimum does permit the district and a requester additional flexibility commensurate with the complexity of the proposed alteration, CPRA is concerned that the lack of a specified minimum threshold could be misinterpreted to result in an even more onerous design requirement than the previous 60% minimum. Importantly, on January 18, 2018, you confirmed to the House Subcommittee on Water Resources and Environment that the USACE’s removal of the 60% minimum in its January 12, 2018 Interim 408 Policy Directive was intended for districts to be able to make a 408 decision with *less than* 60% design, not more than 60%.⁴ Given the importance of this policy as indicated by USACE’s Interim 408 Policy Directive, combined with your statement to the Subcommittee on Water Resources and Environment that the removal of the 60% minimum was not intended to be used to increase the level of design detail required for a conditional 408 authorization, CPRA requests that USACE add a provision to this section

¹ EC 1165-2-216 (Sept. 30, 2015), Section 7.c.(3)(a).

² *Id.*

³ Draft EC 1165-2-220 (Jan. 23, 2018), Section 10.c.(1).

⁴ United States. Cong. House. Committee on Transportation & Infrastructure, Subcommittee on Water Resources and Environment. *Hearing on America’s Water Resources Infrastructure: Approaches to Enhanced Project Delivery*. January 18, 2018. 115th Cong. 2nd sess. (statement of Mr. James C. Dalton, Director of Civil Works, USACE), available at <https://www.youtube.com/watch?v=VfkZj8Q9n2I&feature=youtu.be> (2:37:56-2:38:46).

clarifying that a decision for a particular alteration request will be made “no later than at 60% completion of plans and specifications and supporting technical analysis.”

CPRA is concerned that mandatory sequencing of the 408 review and Section 10/404 permit decisions could result in unnecessary delays to project implementation and requests that these two processes be decoupled.

Section 7.h.(3) of the Draft EC provides that, “[a]lthough reviews for both Section 408 and Regulatory purposes can be conducted concurrently, final decision-making requires that the Section 408 decision be rendered before or concurrent with, but not after, the Regulatory permit decision.” While it appears that the intent of this provision is to ensure coordinated Section 408 and regulatory reviews and the elimination of duplication of efforts, CPRA is concerned that mandatory sequencing may ultimately push the regulatory permitting process to a longer time frame than necessary.

More specifically, CPRA is concerned about the impact to projects where the 10/404 decision would be unnecessarily delayed pending the 408 decision. Because the 10/404 process relies on an entirely different set of analytical criteria than the Section 408 process, the 10/404 decision can generally be rendered with a much lower level of design than a 408 decision (particularly in instances where an application can be reviewed based on existing NEPA documentation). Mandatory sequencing could therefore result in unnecessary delays for projects that need a 408 permission for some aspects of the project, but also contain features that do not require a 408 permission. In such instances, if the 10/404 decision was issued in advance of the 408 permission, construction could commence more quickly on those elements outside of the 408 review. And even when projects cannot commence construction in advance of the 408 permission, earlier issuance of a 10/404 authorization would commence appeal timelines for those permits, potentially allowing appeals to be resolved while the 408 review process moves along.

Importantly, the Draft EC acknowledges how different the 10/404 process is from the 408 process. For instance, Section 7.h.(2) of the Draft EC provides that the determination of a lead district for purposes of Section 408 may be different from the determination of a lead district for other purposes such as for coordination of Regulatory permits (Section 10/404/103). Appendix D, Section D-3.c. of the Draft EC also references how sequencing might impact projects where different scopes of analyses are required due to differences in the geographical extent of jurisdiction under 10/404 and 408.⁵ The provisions in Section 9.c.(3) of the Draft EC further highlight the difficulties of sequencing the 10/404 process and the 408 process relative to implementation of phased construction activities by

⁵ See Appendix D, D-3.c. acknowledging that “the scope of analysis for a Section 408 request may be different than the scope of analysis for a Regulatory permit review (Sections 10/404/103) for the same proposal because the geographic extent of jurisdiction under each authority may be different.”

requiring NEPA and other environmental compliance to be satisfied for a given construction phase in order to render a 408 decision on that phase.

For all of these reasons, CPRA requests that the Section 10/404 permit review be allowed to proceed independently of the 408 process, rather than requiring that the Section 10/404 decision await full completion of the Section 408 process. CPRA believes that, given the significant differences in the Section 10/404 and Section 408 processes, a uniform requirement to sequence these processes will ultimately result in substantial project delays rather than encouraging efficiencies. Additionally, it seems more likely than not that mandatory sequencing will largely preclude requesters from moving ahead with functionally independent parts of a project.

CPRA requests that the USACE remove the statement that “proposed alterations that will result in substantial adverse changes in water surface profiles will not be approved” in order to avoid any potential appearance of pre-decisional determinations regarding what alterations would be injurious to the public.

In Section 11.a.(2), the Draft EC provides that “[a]s a general rule, proposed alterations that will result in substantial adverse changes in water surface profiles will not be approved.” As an initial matter, it is unclear what would constitute a “substantial” adverse change in water surface profile and whether there are threshold considerations in determining what changes might be “substantial”. Additionally, it is unclear how the USACE would take into account situations in which there may be some changes in water surface profiles that could be classified as “adverse” under certain circumstances but that would also result in beneficial longer-term outcomes, especially with regard to long-term beneficial ecosystem outcomes. Likewise, it is unclear whether the USACE will evaluate historical water surface profiles to determine whether there has been a “substantial adverse change” or whether such a determination will only be made based on the most recent water surface profile? It is also unclear whether the denial of approval for a proposed alteration deemed to result in substantial adverse changes in water surface profile would be limited to only the alteration under 408 or to the larger 10/404 regulatory permit decision.

As currently written, this section could be applied broadly to prohibit any ecosystem restoration project based on criteria that is entirely too subjective to provide any real clarity to how such a decision may be reached. CPRA is also concerned that the statement that “[a]s a general rule, proposed alterations that will result in substantial adverse changes in water surface profiles will not be approved” would constitute a pre-decisional determination circumventing the public process that many ecosystem restoration projects could not be constructed. As such, CPRA requests that this unconditional statement be removed, and that USACE consider the significance of potential changes in water surface profiles on a case-by-case basis, as part of the 408 review process.

CPRA requests that a more general example be used to illustrate how a Section 408 alteration to a USACE project could continue to meet its authorized flood risk management purpose in order to avoid prescribing a particular flood reduction measure for an entire category of proposed alterations that may or may not be appropriate depending on the specifics of each project within that category.

In Section 7.h.(5) of the Draft EC, there is an example used to illustrate how a USACE project with a proposed Section 408 alteration can still meet its authorized flood risk management purpose by using a different type of flood reduction measure than the one originally designed by USACE: a “proposed alteration to permanently breach a levee system for ecosystem restoration purposes,” where all structures would be raised behind the levee to achieve the same flood risk management benefits. While we understand the rationale behind this example, CPRA is concerned that the example implies increased risk for a community will necessarily result from any permanent levee breach even where the project is designed to create longer-term reduced flood risk benefits through wetland creation resulting from the permanent breach. Additionally, this example implies that there may be only one method to achieve the same flood risk management benefits – by raising all structures behind the levee, rather than referencing that as one of multiple options that may be considered.

CPRA requests that a different and/or more general example be used in this section. One such example could be a proposed alteration of a levee where the alteration increases the project’s risk such that the alteration may include a non-structural improvement, such as an improved Flood Emergency Evacuation/Notification Plan or the raising of certain structures behind the levee, thus allowing the proposed alteration to achieve the same flood risk management benefits. CPRA believes that a more general example would (i) avoid the appearance of automatically prescribing one particular flood reduction measure for an entire category of proposed alterations without regard to the specifics of each project within that category, and (ii) better emphasize that appropriate flood reduction measures depend on the details of the project in question and are therefore determined on a case-by-case basis.

CPRA requests a dispute resolution process be included for 408 decisions.

Section 10.c.(1) of the Draft EC provides that the district and the requester will work closely together to “determine the applicable USACE standards to be applied and the specific level of detail necessary to be provided in order for USACE to make a decision for a particular alteration request.” However, while it is clear that requesters will have the opportunity to provide input to the district for the standards and detail necessary for a 408 request, it is the district that will ultimately determine “the appropriate level of detail.” CPRA requests that a dispute resolution process be included in Section 10.c.(1) should the district and the requester, even after working closely together, fail to agree on the

appropriate level of detail necessary to be provided in order for the USACE to make a decision for a particular alteration request. Such a process would ensure that this important issue can be appropriately elevated so that an impartial decisionmaker can ultimately help resolve the conflict.

CPRA requests clarification on when a USACE project is “affected” by an alteration.

Section 10.f. of the Draft EC provides that if operation and maintenance of a USACE project being modified is “affected” by the alteration, the requester, or the non-federal sponsor must “agree to assume responsibility for the changed OMRR&R of the USACE project at no cost to the federal government.” CPRA requests additional clarification on the term “affected” in Section 10.f so that non-federal sponsors that are agreeing to assume responsibility for changed OMRR&R of a USACE project at no cost to the federal government can understand exactly what might trigger these obligations when a USACE project is “affected” by an alteration. For example, what if the changed OMRR&R obligations are ultimately less expensive and/or burdensome to the USACE? Will the USACE then reimburse or credit the non-federal sponsor for these cost savings? CPRA likewise requests clarification of the term “affect” in the context of operations and maintenance of a proposed alteration in Appendix D, Section D-3.c of the Draft EC to clarify whether a USACE project will be considered to be “affected” by an alteration only if the alteration results in an overall increase in the burden on the USACE for operations and maintenance, as opposed to a reduction in burden for operations and maintenance.

CPRA requests clarification on the notification and review timelines.

CPRA requests that the reference to the timeline being “restarted” in Section 12.b.(2) of the Draft EC be clarified to mean “resumed”, rather than started over, so that projects will not be required to undergo an entirely new 90 day timeline thereby further delaying project implementation.

CPRA requests that the USACE update its website so that the most recent Real Estate Handbook be referenced and/or made publicly available.

Section 10.e. of the Draft EC requires districts to follow the normal approval requirements outlined in reference A.26 (ER 405-1-12, Real Estate Handbook (restricted file)) for proposed alterations that include a non-standard estate. The Real Estate Handbook is listed as a “restricted” file in the Draft EC and on the USACE’s website and is only available upon request.⁶ However, the version of Engineering Regulation 405-1-12 referenced on the USACE’s website is dated Nov. 20, 1985, while the version the State of Louisiana was provided is dated May 1, 1998. Accordingly, the version available upon request on the

⁶See <http://www.publications.usace.army.mil/USACE-Publications/Engineering-Regulations/u43546q/4552203430352D312D3132/>

USACE's website appears to be outdated and CPRA requests that the most recent version be referenced and/or made publicly available rather than upon request.

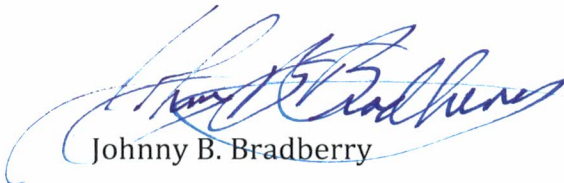
CPRA appreciates the clarification regarding when procedures in the Draft EC apply.

CPRA appreciates USACE's clarification in Section 8.a.(1) that the procedures in the Draft EC apply to projects that are not yet constructed or under construction "if the activity will occur on land the non-federal sponsor has provided for the USACE project under the terms of a Project Partnership Agreement (PPA)." The clarification that the Draft EC applies to alterations on land that a non-federal sponsor has provided under a PPA, rather than to any property acquired for a USACE project or available for USACE projects under the navigation servitude⁷ provides us with greater certainty about when 408 applies and therefore makes it easier for us to move forward with efficient project implementation.

Conclusion

We thank you for allowing us the opportunity to comment on this Draft EC and look forward to your response to the comments we have raised in this letter.

Sincerely,



Johnny B. Bradberry

Chairman, Coastal Protection and Restoration Authority Board

⁷ See EC 1165-2-216 (Sept. 30, 2015), Section 6.c.