

negatively impacted, any further evaluation should be terminated and the requester notified. Section 408 permission will not be granted for a proposed alteration that would have an effect of deauthorizing a USACE project or eliminating an authorized project purpose.

(2) Injurious to the Public Interest. Proposed alterations will be reviewed to determine the probable impacts, including cumulative impacts, on the public interest. Evaluation of the probable impacts that the proposed alteration to the USACE project may have on the public interest requires a careful weighing of all those factors that are relevant in each particular case. The benefits that reasonably may be expected to accrue from the proposal must be compared against its reasonably foreseeable detriments. The decision whether to approve an alteration will be determined by the consideration of whether benefits are commensurate with risks. If the potential detriments are found to outweigh the potential benefits, then it may be determined that the proposed alteration is injurious to the public interest. Factors that may be relevant to the public interest depend upon the type of USACE project being altered and may include, but are not limited to, such things as conservation, economic development, historic properties, cultural resources, environmental impacts, water supply, water quality, flood hazards, floodplains, residual risk, induced damages, navigation, shore erosion or accretion, and recreation. This evaluation should consider information received from key stakeholders, interested parties, Tribes, agencies, and the public. As a general rule, proposed alterations that will result in substantial adverse changes in water surface profiles will not be approved. The Regulatory Program also conducts a public interest review and cannot authorize activities that are “contrary to the public interest.” When an activity requires both a Regulatory review and Section 408 review, Regulatory and the office conducting the Section 408 review should closely coordinate and leverage any information to inform their respective analyses to ensure efficiency and consistency, to the extent appropriate.

(3) Legal and Policy Compliance. A determination will be made as to whether the request meets all legal and policy requirements.

b. Public Notice. Districts must make diligent efforts to solicit public input as part of the decision-making process for a Section 408 request. Except for requests that meet an established categorical permission (where a public notice is issued as part of the establishment of the categorical permission), districts should issue a public notice for all Section 408 requests advising interested parties of the proposed alteration for which permission is sought and soliciting information necessary to inform USACE's evaluation and review. As such, this public notice must be circulated to the public by methods deemed appropriate by the district (e.g., websites, email, social media, or media outlets) as early in the evaluation of a proposed alteration as possible to generate meaningful public and agency input to inform the evaluation and decision-making processes. Because input solicited through the public notice process can inform various aspects of the Section 408 review, such as the public interest determination, environmental compliance, E.O. 11988, informing navigation stakeholders of alterations located in inland and intracoastal waterways, Section 214 funding agreements, and corresponding Regulatory standard individual permit applications, all effort should be made to ensure the public notice is developed and coordinated in a manner that helps maximize the value and use of the input received, and reduces the potential for issuing multiple public notices for different purposes. Likewise, for those Section 408 requests in which another federal agency is the lead

federal agency, districts should coordinate with the lead agency to issue concurrent or joint public notices, when feasible and appropriate. The comment period associated with the public notice should generally be no more than 30 calendar days, but may deviate from this guideline in order to satisfy multiple purposes (i.e., 60 day comment period for a draft EIS) or to facilitate a joint public notice with another federal agency. Section 408 requests for which an environmental assessment (EA) is prepared or a categorical exclusion is used, draft NEPA compliance documents should not be circulated for public comment, except in rare circumstances. Instead, this public notice soliciting input will serve as the method of involving the public in the NEPA process in accordance with 40 CFR 1501.4(e)(1). Environmental compliance may require other consultation and public engagement activities beyond a basic public notice. See Appendix D for more information on environmental compliance.

c. USACE Review Plan. The review of each Section 408 request will be conducted in conjunction with a review plan. Districts should ensure requesters understand the review requirements as early in the process as possible. A review plan will define the USACE resource requirements and procedures of how the review and decision for the Section 408 request will be conducted and rendered, respectively. The USACE review team will be subject matter experts based on expertise, experience, and skills, from multiple disciplines as necessary to ensure a comprehensive review. If the requester is not the non-federal sponsor, the review plan must also include opportunities for the non-federal sponsor to provide input on potential impacts to their responsibilities throughout the review process. Districts are encouraged to review information submitted by requesters as the review plan is being finalized, but no final Section 408 decision will be rendered without an approved review plan in place. Section 408 review plans do not have to be posted on the internet. If a SAR is required, districts and divisions may use discretion to post the SAR report on the district or division website. If the decision is made to post the SAR report, districts and/or divisions will ensure appropriate protection of sensitive or security related information when posting the SAR report.

(1) For categorical permissions, the review and validation process is established and documented as part of the creation of the categorical permission; therefore, no separate review plan is needed. Reference Appendix C for additional information for categorical permissions.

(2) Districts have the option to develop an overarching review plan, 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 12.c.(4). Procedural Review Plans are approved by the Division Commander; however, the Division Commander may delegate signature authority for the Procedural Review Plan to either the Division Regional Programs Director or the Division Regional Business Director. Districts must review and update approved Procedural Review Plans on an annual basis. The division must reapprove the Procedural Review Plans if there are any significant changes in scope or process.

(3) Districts must develop alteration-specific review plans for Section 408 requests that are not covered by a categorical permission or Procedural Review Plan. Section 408 requests using the multi-phased review approach, reference paragraph 10.c., or requiring a SAR, must have an alteration-specific review plan. If the multi-phased review approach is being used,

documentation of established milestones will be managed in the district's review plan for the Section 408 request. Milestones can be adjusted as part of the process for updating the review plan. The decision-maker of the Section 408 request, reference paragraph 8, will be the approver of alteration-specific review plans. For example, if the decision-maker is the Division Commander, the Division Commander or the Division Commander's designee must approve the review plan. The Division Commander may delegate signature authority for the review plan to either the Division Programs Director or the Division Regional Business Director. If the Section 408 is to be approved by the District Commander, the District Commander must approve the review plan and so on. The division may choose to approve alteration-specific review plans that could be approved at the district level. Approved alteration-specific review plans must be updated as needed; however, if there are any significant changes in scope or process of the review, then the review plan must be reapproved at the appropriate approval level. The Review Management Organization (RMO) responsibilities can be at the level in which the Section 408 decision is made, with the exception of Section 408 requests that require a SAR, reference paragraph 12.c.(4). See reference A.40 for RMO responsibilities.

(4) The district Chief of Engineering will refer to reference A.40, or subsequent policy, to determine if a SAR is required for a proposed alteration. For alterations involving a levee or dam, this decision will be made in consultation with the district Dam Safety Officer or Levee Safety Officer when they are not the same person as the Chief of Engineering. If the district determines a SAR is required, an alteration-specific review plan must be developed and the Risk Management Center (RMC) will be assigned as the RMO for the entire Section 408 review including the SAR. The final alteration-specific review plan and SAR review plan must be endorsed by the RMC and approved by the Division Commander or the Division Commander's designee. The Division Commander may delegate signature authority for the review plan to either the Division Regional Programs Director or the Division Regional Business Director. The district will work with the requester in the development of the review plan for the SAR. The district will include the requester's SAR review plan as an appendix to the USACE alteration-specific review plan.

13. Overall Process. The overall USACE review process for Section 408 requests involves four main steps: completeness determination (reference paragraph 14.); review and decision; (reference paragraph 15); final decision notification (reference paragraph 16); and construction oversight (reference paragraph 17). All information submitted by the requesters should be transmitted to the appropriate USACE district office having jurisdiction over the USACE project being altered.

a. The first submittal of information to the USACE district office should have a cover letter signed by the entity requesting the Section 408 permission.

b. Submittals may be accepted electronically (such as email or file transfer) or by hard copy. When the initial submittal is received, the district will create a database entry for that request, including the assignment of a unique identifier (to be automatically generated by the Section 408 database). The unique identifier will be used for tracking purposes throughout the entire Section 408 request process and will be referenced in all correspondence with the requester.

c. USACE will provide timely responses to requesters regardless of the type of Section 408 request or the stage of the review. Written notifications by districts to requesters can be provided by the district electronically or by hardcopy, depending on the preference of the requester. Districts will tailor content of the written notifications to each given situation. See Appendix J for example letters to requesters.

d. At any time in the process, a requester may choose to withdraw their Section 408 request in writing. In this case, the district will record the date of withdrawal in the Section 408 database.

e. For Section 408 requests involving funding agreements, the time required to develop and execute funding agreements, reference paragraph 7.g., themselves will not be subject to the notification timelines referenced in paragraphs 14 and 15. The districts will ensure timely responses and engagement in developing and executing funding agreements.

f. The written notifications to requesters may be issued and signed by the Section 408 Coordinator or other signatory designated by the District Commander, except for final decision notifications. Final decision notifications for validation of categorical permissions, single-phased decisions, or multi-phased review decisions will follow appropriate decision processes as specified in paragraph 8.

14. Step 1: Completeness Determination. This first part of the process involves the requester providing information to the district in one or more submittals in order to satisfy all the basic requirements of a complete Section 408 request as indicated in paragraph 11. When a requester submits information to a district office, districts are expected to provide a written completeness determination within 30 days of receipt. If the district determines a submittal is not complete, the district will provide the requester a written notification within 30 days of receipt, providing a description of what information is required in order for the submittal to be complete. A submittal will be determined complete and therefore initiate the 90-day review and decision step (reference paragraph 15), when it meets one of the following scenarios:

a. For categorical permissions, information submitted by the requester will be considered complete when the information provided demonstrates the proposed alteration appears to meet the conditions of an established categorical permission. If the district can validate the use of the categorical permission based on the information in the submittal of information within 30 days of receipt, then the district can proceed and grant permission under the categorical permission and notify the requester in lieu of providing a completeness determination letter. If not, then the 90-day review and decision step will be initiated with the district providing a written notification that the submittal in accordance with a categorical permission is complete.

b. For requests using the multi-phased review approach, a completeness determination will be done on each milestone submittal. The requirements to determine what information is required for each milestone should be pre-determined and planned between the district and requester. When a district issues a written notification that a milestone is complete, that will initiate the 90-day review and decision step for that milestone.

c. For requests intended for a single-phased review, a submittal will be determined complete when all the basic requirements, reference paragraph 11, has been submitted. When a district issues a written notification that all basic requirements have been submitted, that will initiate the 90-day review and decision step for that Section 408 request.

d. If after evaluating the information provided by a requester the district determines that processes in this EC do not apply, the district will provide the requester a written notification within 30 days of receipt of the information with a description of why this EC would not apply and any other recommendations for the requester's next course of action, if needed.

15. Step 2: USACE Review and Decision. During this step, USACE will evaluate the information provided for the completeness determination following the review requirements in paragraph 11. This second step of the process results in USACE providing a final decision for either validating use of a categorical permission; a specific milestone; or a complete Section 408 request. Approval of the use of a categorical permission or a complete Section 408 request means that the requester can proceed to construction of the alteration, subject to specified conditions. Approval of a specific milestone results in the requester proceeding to the next milestone, unless the submittal is the final milestone. Approval of the final milestone constitutes approval of the entire Section 408 request; must be rendered by the appropriate Section 408 decision-maker (reference paragraph 8); and results in the requester being able to proceed to construction of the alteration, subject to specified conditions. Approval of a request submitted under the single-phased review approach means the requester can proceed to construction of the alteration, subject to specified conditions.

a. Timeline for Review and Final Decision. A final decision will be provided by USACE to the requester within 90 days from the date the completeness determination was made by the district, unless one of the following stipulations apply. This 90 day timeframe is inclusive of the time needed for division review and decision, if required.

(1) If a final decision cannot be made within 90 days, the district will provide a written notification to the requester with an estimated decision date. If the decision date extends beyond 120 days from a completeness determination, the district will send a memorandum through the Division Commander to the Director of Civil Works with a description of the Section 408 request and a justification for the decision extending beyond 120 days. This information will be provided to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives.

(2) There may be cases during the USACE review and decision phase in which it is identified that more information is needed to render a final decision. If the additional information is needed to support or clarify the pending Section 408 request, the coordination for obtaining the additional information can be done informally between the district and requester. The 90 day timeframe for the final decision continues to run during this informal coordination. If the need for additional information is triggered by a change in the scope or scale of the alteration to the extent that new technical analyses, environmental compliance, and/or real estate review is required, the district must provide written notification to the requester of the additional information required in order for the revised Section 408 request to be complete. This action

will cease the 90 day review and decision timeline. When the requester submits all of the required information, a new completeness determination will be made and the 90 day timeline will be restarted from the date of the new completeness determination.

b. Summary of Findings. The district will create a Summary of Findings (content and format scalable to the request) to serve as the decision document to summarize the administrative record, including the review findings and the basis for the final Section 408 decision. A Summary of Findings does not have to be developed for each individual milestone for the multi-phased review approach, but is required when the final milestone is reviewed and must summarize the entire Section 408 decision collectively. The Summary of Findings should include the following, as a minimum:

- (1) USACE project description and authorization;
- (2) Brief description of the request;
- (3) Description and reference to the review plan process followed, including SAR determination;
- (4) Summary of rationale and conclusions for recommending approval or denial, including determinations for the impact to the usefulness of the USACE project; whether or not the alteration is considered integral to the USACE project; and impacts to the public interest;
- (5) Certification of legal sufficiency by Office of Counsel;
- (6) Certification by the District Chief of Real Estate Division that all real property required for the proposed alteration has been identified; the identified real property is sufficient to support the alteration; and the proposed alteration will not adversely affect the USACE project's real property. If the proposed alteration will be integral to the functioning of the USACE project, the District Chief of Real Estate Division must also certify that standard estates are being used for the acquisition of any new real property that will become or may become a part of the USACE project, or that the requester is seeking approval to use non-standard estates (see paragraph 11.e.);
- (7) Description of any related, ongoing USACE studies (if applicable), including how the proposed alteration may impact those studies;
- (8) Summary of input from the non-federal sponsor, if the non-federal sponsor is not the requester;
- (9) Summary of any changes to the O&M manual;
- (10) If the district has determined that USACE would assume O&M responsibilities as part of its responsibilities for the USACE project, include the rationale and any anticipated increase in USACE O&M costs;

(11) The NEPA Finding of No Significant Impact or Record of Decision, if the NEPA decision has not already been documented (such as applicability of a categorical exclusion, validation of a categorical permission, or an EIS led by another Federal agency); and,

(12) Any additional final conclusions or information, including any associated controversial issues.

16. Step 3: Final Decision Notification. The district is responsible for providing a written decision signed by the USACE deciding official to the requester for all final Section 408 decisions, regardless of the decision level.

a. For those requests in which the non-federal sponsor is not the requester, USACE will coordinate with the non-federal sponsor to obtain their feedback and consider that feedback prior to the final decision notification. This is to afford the non-federal sponsor an opportunity to review and evaluate the proposed alteration along with the technical analysis and design, environmental effects, real estate requirements, and potential O&M effects. However, USACE retains final decision-making authority over whether Section 408 permission should be granted.

b. If the final decision is to deny the request, the requester will be advised in writing as to the reason(s) for denial.

c. If the final decision is to approve the Section 408 request, the district will provide a written approval document. For cases involving a categorical permission, the written approval will be validation that the categorical permission is applicable.

d. In situations in which the district is evaluating a Regulatory standard individual permit application and Section 408 combined, reference paragraph 7.h.(4), the district will ensure the final Section 408 decision letter and associated conditions be part of the single transmittal letter with the Regulatory permit. In situations where the district also is evaluating a Section 10/404/103 permit application, the district may forward the Section 408 decision letter with the Section 10/404/103 permit decision, once it is made, provided that the Section 10/404/103 decision is rendered no later than one week after the Section 408 decision.

e. Standard Terms and Conditions and Special Conditions. At a minimum, the standard terms and conditions in Appendix K, except where noted as optional, must be included in all Section 408 approval notifications, including validation of use of a categorical permission. Districts and divisions may include any necessary special conditions as requirements for approval.

17. Step 4: Construction Oversight. District costs for construction oversight and closeout should be incorporated as part of review costs for the Section 408 request.

a. Construction oversight. The district should develop procedures for monitoring construction activities, including reviewing construction documentation at different phases if necessary, for the approved Section 408 request scaled to the complexity of the alteration to ensure the alteration is constructed in accordance with the permission conditions. If a SAR was

required, there may be SAR activities that carry through during construction. Any concerns regarding construction should be directed to the Section 408 requester (and the non-federal sponsor if applicable) for resolution.

b. As-builts. Plans and specifications with amendments during construction showing alterations as finally constructed will be furnished by the Section 408 requester after completion of the work if required by the district. As-builts must be provided to the district and the non-federal sponsor (if the requester is not the non-federal sponsor) within 180 days of construction completion.

c. O&M Manual Updates. The Section 408 requester is required to provide the district with sufficient information to update the portions of the USACE issued O&M manual to reflect changes as a result of the constructed alteration if necessary. If the requester was not the non-federal sponsor, the non-federal sponsor must be given must an opportunity to review all proposed changes to the O&M manual. O&M manual updates may range from simple removal and replacement of paragraphs or entirely new manuals depending on the scope and complexity of the alteration. The district is responsible for reviewing and approving any updates needed to the O&M manual as a result of the alteration. At a minimum, the update should include a description of the new features, reference to the Section 408 approvals, as-builts, and instructions regarding O&M of any new features not included in the existing manual. Reference A.32 and A.34 for information on O&M manuals.

d. Post Construction Closeout. District may need to conduct a post construction on-site inspection of the completed alteration to document final condition of the USACE project.

18. Enforcement.

a. Inspection and monitoring of approved and in-place alterations will be incorporated into the inspection and oversight procedures for that specific USACE project.

b. The policy of USACE is to pursue enforcement and correction of unauthorized alterations. If an unauthorized alteration is discovered, the district, after consulting with the Offices of Counsel and Real Estate, will take the appropriate steps to remedy the unauthorized alteration. Coordination with the district Regulatory office should also occur so it can be determined if any action should be taken with respect to Section 10/404/103. Regulatory funds cannot be used for enforcement and correction of unauthorized alterations. Specific enforcement steps the district takes will depend on the particular nature of the unauthorized alteration and whether the unauthorized alteration is located on project boundaries where a non-federal sponsor holds the land rights for operations and maintenance. Non-federal sponsors with operations and maintenance responsibilities for the USACE project remain responsible for ensuring no unauthorized alterations are occurring within the project boundaries.