



US Army Corps
Of Engineers
Great Lakes and
Ohio River Division

Public Notice

Comment Period Begins:
March 14, 2022

Comment Period Ends:
April 13, 2022

PROPOSED REGIONAL CATEGORICAL PERMISSION PROGRAM FOR SECTION 408 REQUESTS

AUTHORITY:

The authority to grant permission for temporary or permanent use, occupation or alteration of any U.S. Army Corps of Engineers (USACE) civil works project is contained in Section 14 of the Rivers and Harbors Act of 1899, as amended, codified at 33 U.S.C. 408 ("Section 408"). Section 408 authorizes the Secretary of the Army, on the recommendation of the Chief of Engineers, to grant permission for the alteration or occupation or use of a USACE project if the Secretary determines that the activity will not be injurious to the public interest and will not impair the usefulness of the project. The Secretary of the Army's authority under Section 408 has been delegated to the USACE, Chief of Engineers. The USACE Chief of Engineers has further delegated the authority to the USACE, Directorate of Civil Works, Division and District Commanders, and supervisory Division Chiefs depending upon the nature of the activity.

INTRODUCTION: There are numerous USACE civil works projects within the boundaries of the Great Lakes and Ohio River Division (LRD). These projects have been federally authorized by the U.S. Congress and then turned over to a non-federal sponsor to operate and maintain. Projects may include flood risk reduction projects, ecosystem restoration projects, navigation projects, etc. Each year the Districts within LRD receive requests through a non-federal sponsor from private, public, tribal, and other federal entities (requesters) to alter USACE federally authorized civil works projects ("USACE projects") pursuant to Section 408.

When a District within LRD receives a request to alter a USACE project, the district follows a review process outlined by Engineering Circular (EC) 1165-2-220, Policy and Procedural Guidance for Processing Requests to Alter US Army Corps of Engineers Civil Works Project Pursuant to 33 USC 408 (Attachment 1). To simplify the review process, EC 1165-2-220 states that USACE districts can develop categorical permissions to cover potential alterations that are similar in nature and that have similar impacts.

Districts within LRD receive numerous Section 408 requests for minor alterations to USACE projects each year; a total of 129 requests were received in 2020 and 174 requests were received in 2021. The majority of these requests are for relatively minor alterations. Many of the project descriptions for proposed alterations are similar and the effects tend to be minor or negligible. However, the current review and approval process is time intensive and can take months. The need for the proposed action is to increase

efficiencies in the review process of Section 408 requests for minor alterations to USACE federal projects.

Districts within LRD propose to implement a categorical permission in order to create efficiencies in the review process for Section 408 requests for minor alterations to USACE projects within the civil works boundaries LRD.

ALTERNATIVES: The decision options are: 1) No Action Alternative: continue with the current process of reviewing and making decisions on Section 408 requests individually, as described in EC 1165-2-220, or 2) Preferred Alternative: approve a categorical permission to cover potential alterations that are similar in nature and have similar impacts.

SCOPE OF THE DECISION: LRD's area of responsibility covers a wide geographic area and includes all or portions of the following states: Alabama, Georgia, Illinois, Indiana, Kentucky, Maryland, Michigan, Minnesota, Mississippi, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and Wisconsin (Attachment 2). The geographic scope of the decision to be made is limited to USACE federal projects within the following states in LRD's boundaries: Illinois, Indiana, Kentucky, Michigan, New York, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and Wisconsin. The decision does not apply to civil works projects within the following states in LRD's boundary — Alabama, Georgia, North Carolina, Maryland, Minnesota, Mississippi, and Virginia — or to any other USACE Division. The decision only applies to federally authorized levees, channel modification projects, ecosystem restoration projects, dredging projects, and navigation projects. The temporal scope of the decision to be made is for five years; after five years the decision would be reevaluated and may be renewed or revised, if appropriate.

PROPOSED CATEGORICAL PERMISSION: The proposed categorical permission would encompass a list of potential alterations that are similar in nature and have similar and minor impacts. If an environmental assessment (EA) or environmental impact statement (EIS) is needed for the National Environmental Policy Act (NEPA) documentation of a proposed alteration, then the proposed categorical permission would not apply and the Section 408 request would be reviewed and a decision made following the current process described in EC 1165-2-220.

In order for the categorical permission to apply, a Section 408 request must incorporate standard mitigation measures and best management practices into the project plan. Projects would be required to minimize disturbance to surrounding vegetation, return disturbed areas to pre-project conditions, remove spoils, control storm water runoff and erosion, and not to exceed federal *de minimis* levels of criteria air pollutants or precursors.

The proposed categorical permission would encompass the following types of alterations:

1. **Utility Line Activities:** Alterations under this category are activities (including necessary for temporary access) related to the installation, replacement, maintenance, or abandonment of utility lines (including electric lines, telecommunication lines, lines for water and other substances, and excluding oil and natural gas pipelines) such as:
 - **Overhead pipes and cables** (including stabilizing guy wires and anchors and other related work);
 - **Underground pipes and cables** (including pipes, cables, and conduits installed via directional drilling, boring, tunneling, cut-and-fill, open trench, water jet, and similar techniques); and
 - **Related utility appurtenances** (including headwalls, pipe slip-lining, corrosion prevention devices, backflow prevention devices, outfalls, intakes, fish screens, etc.).
2. **Vertical Drilling Activities:** Alterations under this category include activities related to the installation, development, maintenance, and abandonment of vertical features such as:
 - **Geophysical or geotechnical investigations and borings;**
 - **Measurement devices** (including monitoring wells, piezometers, etc.); and
 - **Foundations** (including piles, caissons, drilled shafts, and footings).
3. **Development Activities:** Alterations under this category include activities related to residential, commercial, or institutional developments with a total project land disturbance of one acre or less, such as:
 - **Simple buildings** (including appurtenances such as dumpster/trash areas, decks, patios, storage containers, and storage sites);
 - **Decorative, recreational, or aesthetic features** (including shelters, sheds, outbuildings, signage/billboards, lighting, pools, small ponds, fire pits, sculptures, fencing, cattle crossings, and simple retaining walls);
 - **Access structures** (including stairs, ramps, walkways, gangways, landings, and pads);
 - **Landscaping activities** (including trees, bushes, and other vegetation, and soil grading, fill, and other structural geo-forming);
 - **Stormwater control features** (including catch basins, energy dissipation measures, and other best management practices); and
 - **Related temporary construction activities** (including staging areas, borrow areas, stockpiles, access roads).
4. **Linear Transportation Activities:** Alterations under this category include activities related to the construction, maintenance, modification, or removal of linear transportation projects, such as:
 - **Simple roads and driveways** (including crossings, culverts, roadway markings, guard railings, ramps, noise barriers, shoulders, sidewalks);
 - **Simple bridges** (including pedestrian, recreational, vehicular, railroad); and
 - **Recreational trails** (including pedestrian, bicycle, other off-road vehicles).

5. **Water-Based Activities:** Alterations under this category include activities related to the installation, maintenance, replacement, modification, and removal of activities incident to water-related development, such as:
 - **Access structures** (including piers, decks, mooring buoys and dolphins, boat hoists, boat storage);
 - **Protective structures** (including dolphins, fenders, piles);
 - **Aids to navigation;**
 - **Bank stabilization** (including revetments, bulkheads, biotechnical practices) no greater than 1,000 feet in length along the bank;
 - **Removal of wrecks and obstructions;** and
 - **Maintenance dredging** to previously authorized depths or controlling depths for ingress/egress, whichever is less.
6. **Operations, Maintenance, and Safety Improvements to Federal Projects:** Alterations under this category include activities proposed by a third-party to improve features of a USACE Civil Works Project, such as:
 - **Safety measures** (including railings, guardrails, handrails);
 - **Drainage and erosion control improvements** (including ditches, interior drainage pipes, and riprap or other hard stabilization techniques);
 - **Instrumentation and automation** (including Supervisory Controls and Data Acquisition [SCADA], automation of gates and project features); and
 - **Activities to improve or maintain the level of protection** (including minor raising of a flood wall/levee in order to meet FEMA accreditation requirements, per 44 CFR 65.10(b)(1), seepage and stability berms, permanently abandon obsolete structures).
7. **Activities Meeting a USACE Categorical Exclusion from NEPA:** Alterations under this category include activities meeting the USACE-promulgated categorical exclusion from the National Environmental Policy Act (NEPA), such as:
 - **Activities listed in 33 CFR 230.9;** and
 - **Activities listed in 33 CFR 325 Appendix B.**
8. **Ecosystem Enhancement Activities:** Alterations under this category include activities with a primary purpose of restoration, establishment, or enhancement of the environment, such as:
 - **Habitat improvement activities** (including green breakwaters and other fish habitat structures, bird nesting features, floating gardens, reestablishment of aquatic vegetation); and
 - **Research and monitoring devices** (including wildlife tracking equipment, observation blinds).
9. **Resolution of Enforcement Actions:** Alterations under this category include activities remaining in place that altered a USACE Civil Works project without authorization, and/or activities undertaken for mitigation, restoration, or environmental benefit in compliance with:
 - (i) The terms of a final written **Corps non-judicial settlement agreement** resolving a violation of Section 14 of the Rivers and Harbors Act of 1899;
or

- (ii) The terms of a final **Federal court decision, consent decree, or settlement agreement** resulting from an enforcement action brought by the United States under Section 14 of the Rivers and Harbors Act of 1899; or
- (iii) The terms of a **final court decision, consent decree, settlement agreement, or non-judicial settlement agreement resulting from a natural resource damage claim** brought by a trustee or trustees for natural resources (as defined by the National Contingency Plan at 40 CFR subpart G) under Section 311 of the Clean Water Act, Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act, Section 312 of the National Marine Sanctuaries Act, section 1002 of the Oil Pollution Act of 1990, or the Park System Resource Protection Act at 16 USC 19jj, to the extent that a Corps Section 408 permission is required.

ENVIRONMENTAL IMPACTS OF PROPOSED ACTION: The District's within LRD propose to implement a categorical permission that, in accordance with EC 1165-2-220, would simplify the review process for Section 408 requests for minor alterations to USACE projects. The Districts within LRD have determined that, in compliance with NEPA, a programmatic EA will be prepared. As the implementation of the categorical permission would not involve any on-the-ground work, there are no anticipated direct effects to environmental resources resulting from the programmatic decision at hand. Although the categorical permission would be for a variety of alteration types that individually could result in impacts to resources, it is important to note that the decision to be made on the categorical permission would not authorize any specific Section 408 requests or any on-the-ground work. If the proposed categorical permission is approved, future Section 408 requests would be individually reviewed to determine if they fit under the categorical permission.

Under the proposed categorical permission each individual Section 408 request would be evaluated on a case-by-case basis for compliance with all applicable environmental laws. Additionally, adequacy of the existing NEPA documentation (a programmatic EA for the categorical permission) would be verified for each individual Section 408 request. If the existing NEPA documentation is not adequate, a separate NEPA analysis would be conducted. Section 408 requests for alterations that are not described in the categorical permission (see descriptions above) or that do not adhere to the standard mitigation measures would be evaluated using the current review process for an individual request as described in EC 1165-2-220.

Although the decision on whether or not to implement the proposed categorical permission would not have direct impacts on resources, the types of alterations described under the proposed categorical permission have the potential to impact a number of different resources. Resources that could potentially be affected by these types of alterations include aesthetics, air quality, cultural resources, fish and wildlife, floodplains, invasive species, noise, physiography/soils, recreation, threatened and endangered species, transportation/traffic, vegetation, water quality, and wetlands. It is

expected that the effects associated with the types of alterations covered by the categorical permission described above would be minor or negligible. If a proposed alteration is determined to involve more than minor impacts or would not meet the parameters identified in the project description, the categorical permission would not apply and a categorical exclusion, EA or EIS would be prepared, as appropriate.

Under the proposed categorical permission, the Districts within LRD would continue to individually evaluate each Section 408 request on a case-by-case basis for potential effects to threatened and endangered species (and their designated critical habitat) listed under the federal Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 et seq.) and, as appropriate, conduct consultation pursuant to Section 7 of the ESA with the U.S. Fish and Wildlife Service (USFWS).

Under the proposed categorical permission the Districts within LRD would continue to individually evaluate each Section 408 request on a case-by-case basis for the potential to affect cultural resources and, when there is the potential for effects, conduct consultation with the appropriate State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) pursuant to Section 106 of the National Historic Preservation Act (NHPA) of 1966, as amended (54 U.S.C. 306108 et seq.). When a proposed alteration has the potential to affect cultural resources, the Districts within LRD would coordinate, and consult as appropriate, with potentially interested Native American tribes.

PUBLIC INVOLVEMENT: The purpose of this notice is to solicit comments from the public; federal, state, and local agencies and officials; tribes; and other interested parties regarding the proposed Section 408 Categorical Permission. Comments received within 30 days of publication of this notice will be used in the evaluation to potential impacts of the proposed action on important resources.

SUBMITTING COMMENTS: Written comments, referencing “Section 408 Categorical Permission” must be submitted by email to the office listed below on or before April 13, 2022.

Mr. Colin Smalley of the Chicago District is collecting the comments on behalf of LRD.

Email: Chicago408@usace.army.mil

Attachments (web links):

- 1) [EC 1165-2-220](#)
- 2) [LRD Division Boundary and District Boundary Map](#)