

Section 408 Submittal Package Guide

This guide is intended to ensure a complete submittal, aid in the review process and serve as a guide for sponsors/applicants requesting approval of significant modifications or alterations to a locally or federally maintained US Army Corps of Engineers (USACE) project requiring Chief of Engineers approval under 33 USC 408. Further guidance may be found in EC 1165-2-220. Incomplete submittals to the New York District for quality assurance review prior to making any recommendations or approvals. This submittal package does not preclude the need for pre-coordination with the Section 408 Coordinator. Requesters are encouraged to engage in dialogue with the Section 408 Coordinator early in the process to aid in identifying potential issues, focus efforts and minimizing costs for both parties.

Applicant (Normally the Non-Federal Sponsor) Prepared Documents:

1. Written request for approval of the project modification

- A detailed description of the proposed modification
- The purpose/need for the modification
- An appropriate map or drawing
- Statement regarding whether the requester is pursuing authorization pursuant to Sections 10/404/103, and if so, the date or anticipated date of the application/pre-construction notification submittal
- Written statement of whether the requester will require the use of federally-owned real estate property or property owned by the non-federal sponsor
- Written statement from the non-federal sponsor endorsing the proposed alteration; if applicable
- Anticipation project start date

2. Technical Analysis and Adequacy of Design. All necessary technical analysis should be provided. The minimum level of detail will be 60% complete plans and specifications for a particular alteration request. The list below is only a guide for typical items that would routinely be expected and is not intended to list every item that could be need to make this determination.

- Geotechnical Evaluation
 - i. Stability
 - 1. Under seepage
 - 2. Erosion Control
 - 3. Vegetation
 - ii. Material usage/borrow/waste/transporting/hauling

- Structural
 - i. Bridges and related abutments
 - ii. Pier penetrations of levee embankments
 - iii. Diaphragm walls
 - iv. Other structural components integral to the project
 - v. Gates or other operable features

- Hydraulic and Hydrology. The purpose of a hydrologic and hydraulics system performance analysis is to determine the potential hydrologic and hydraulics impacts of proposed alterations. Districts will determine if such an analysis is needed and, if so, the appropriate scope of analysis based on the complexity of the proposed alteration. The requester will be responsible for the analysis. Hydrologic and hydraulic system performance analyses will be applied to alterations that alter the hydrologic and/or hydraulic conditions (e.g., reservoir operations, bridge construction, hydropower installation, etc.). Such information required to be included are:
 - i. Changes in inflow
 - ii. Changes in water surface profiles and flow distribution
 - iii. Assessment of local and system wide resultant impacts
 - iv. Upstream and downstream impacts of the proposed alterations
 - v. Sediment transport analysis as needed
 1. Impacts to existing floodplain management

- Operation and Maintenance Requirements. Requesters must identify any operations and maintenance requirements needed throughout the life of the proposed alteration and the responsible entity for the operations and maintenance into the future. For instances when there may be a desire for USACE to assume or incorporate operations and maintenance of the proposed alteration as part of its responsibilities for the USACE project being modified, a justification must be provided. Any alteration to a project operated and maintained by a non-federal sponsor and for which an update to the operations and maintenance manual is required, the non-federal sponsor will provide USACE with sufficient information to update the O&M manual. The modified O&M manual will be subject to environmental compliance in the same manner as the requested alteration. The non-federal sponsor will acknowledge in writing their continued responsibility to operate, maintain, repair, rehabilitate and replace the USACE project at no cost to the government and will hold and save the government free from all damages arising from construction, operation, maintenance, repair, rehabilitation, and replacement of the project.

- 3. Real Estate Analysis.** A list of all real estate property interests required to support the proposed alteration must be provided, including those in federally managed lands and those owned by the requester. If a non-standard estate is proposed, the district must follow the normal approval requirements outlined in EC 405-1-11 and Chapter 12, ER 405-1-12 or subsequent regulation. Maps clearly depicting both existing real estate rights and the additional real estate required must also be provided. If the lands are under control of the Army, the applicant will work with the district to determine lands impacted. Additional information may be needed. If it is determined that an outgrant of Army land is required, a *Report of Availability and Determination of Availability* must be completed by the district in accordance with AR 405-80 and Chapter 8, ER 405-1-12 or subsequent regulation.
- 4. Discussion of Residual Risk.** Discuss the changes to the existing level of risk to life, property as a result of the modification. Will the project incur damages more frequently as a result of flooding that will require Federal assistance under PL 84-99? Risk analysis will be used as the method for communicating residual risk.
- 5. Discussion of Executive Order 11988 Considerations**

 - Justification to construct in the floodplain
 - No practicable alternative determination, if Federal agency, Agency determination
 - Public Notice Notifications
- 6. Environmental Protection Compliance.** A decision on a Section 408 request is a federal action, and therefore subject to the National Environmental Policy Act (NEPA) and other environmental compliance requirements. While ensuring compliance is the responsibility of USACE, the requester is responsible for providing all information that the district identifies as necessary to satisfy all applicable federal laws, executive orders, regulations, policies, ordinances and other policy statements of States with jurisdiction in the planning area. Examples are State water and air quality regulations; State historic preservation plans; State lists of rare, threatened, or endangered species; and State comprehensive fish and wildlife management plans. The district must maintain full documentation of compliance as part of the considerations with significant bearing on decisions regarding the 408 request. Typically the minimum submission will include the following:

 - National Environmental Policy Act. The appropriate NEPA process will be determined by the district in consultation with agencies that regulate resources that may be affected by the proposed action. All resources listed in Section 122 of the Rivers and Harbors Act 1970 must be considered. The evaluation will include a description and analysis of

project alternatives, the significance of the effects of each alternative on significant resources. Direct, indirect, and cumulative effects of all reasonably foreseeable actions including the actions of others and natural succession must be considered and documented. A risk analysis must be completed to determine the significance of risks to human life & safety, and property. Mitigation plans must be well described. If Federal funds are or may be involved the mitigation plan must be incrementally justified. NEPA documents will be consistent with 33 CFR 230.

- Endangered Species Act. Coordination/consultation with the US Fish and Wildlife Service and/or NOAA Marine Fisheries Service must be complete. Each agency with jurisdiction over a species that may be affected by the proposed action must provide a letter/memo indicating completion of ESA coordination. This documentation may range from a memo saying no ESA protected species or habitats are in the project impact area through a Biological Opinion.
- Fish and Wildlife Coordination Act (FWCA). Either a Final FWCA Report or a letter from the United States Fish and Wildlife Service (SFWS) stating that a FWCA Report is not required must be included.
- Marine Protection, Research and Sanctuaries Act For projects involving ocean disposal, or dredged material disposal within the territorial seas, the discharge will be evaluated under Section 103 of the MPRSA. The disposal must meet the criteria established by the EPA (40 C.F.R. 227 and 228). The submittal will document that that materials to be discharged are consistent with the current criteria and the disposal site is suitable.
- Wild and Scenic Rivers Act. The submittal will document efforts to identify designated rivers or river reaches (including potential rivers) in the vicinity of the project, and describe follow-up coordination with the agency having management responsibility for the particular river. If a designated river reach is affected, a letter indicating completed coordination is required from the managing agency.
- Coastal Zone Management Act. If the proposed action is in a coastal zone documentation of a "determination of consistency" with the state coastal zone management program the appropriate State agency (16 U.S.C 1456) must be included.
- Clean Air Act. This is a two-part compliance process. First, the submittal must include a determination that the proposed action is consistent with the Implementation Plan of the affected jurisdiction(s), and concurrence of

the appropriate regulatory agency, or a conditional permit. Second, the submittal must include a letter from the United States Environmental Protection Agency (USEPA) that they have reviewed and commented on the environmental impact evaluations including the NEPA documents.

- Hazardous, Toxic and Radioactive Waste (HTRW). HTRW includes but is not limited to the Comprehensive Environmental Response, Compensation and Liability Act, the Resource Conservation and Recovery Act, and the Toxic Substances Control Act. The submittal package must include documentation that the USEPA and appropriate State and Tribal agencies with jurisdiction or expertise have been given reasonable opportunity to comment on the proposed action and that their input has been fully considered. The USACE will not incur additional liability related to HTRW.
- National Historic Preservation Act. This includes all other applicable historic and cultural protection statutes. The submittal package will include documentation that the Advisory Council on Historic Preservation, and appropriate State and Tribal agencies with jurisdiction or expertise has been given a reasonable opportunity to comment on the proposed action and that their input has been fully considered. It is not expected that actual mitigation will be completed but appropriate letters indicating completed Consultation determination of significance must be provided.
- Noise Control Act. Documentation of the significance of noise likely to be generated during construction of the proposed project and the noise that may result due to implementation must be provided. If significant noise may result, a noise mitigation plan must be provided.

USACE has jurisdiction under Section 408 only over the specific activities or portions of activities that have the potential to alter a USACE project. Therefore, if a proposed alteration is part of a larger project (and/or its associated features) that extends beyond the USACE project boundaries, the district should determine what portions or features of the larger project USACE has sufficient control and responsibility over to warrant their inclusion in the USACE environmental review. The scope of analysis for the NEPA and environmental compliance evaluations for the Section 408 review should be limited to the area of the alteration and those adjacent areas that are directly or indirectly affected by the alteration. For example, a pipeline can extend for many miles on either side of the USACE project boundary. In this example, the scope of analysis would likely be limited to the effects of the pipeline within the USACE project boundary, but would not address those portions of the pipeline beyond the USACE project boundary. In contrast, a proposal to alter a levee system might require USACE to examine that proposal's potential effects on the reliability of the levee system to provide flood risk reduction to

the area behind the levee system itself. As a general rule, if there are features of a larger project occurring outside of the USACE project boundaries that are so intimately connected to the features of the larger project altering a USACE project that they cannot be meaningfully distinguished (e.g., a setback levee that is located outside of the original project boundary of the levee being replaced), the USACE Section 408 NEPA document should be broad enough to address all those effects. Generally, elements of the larger project that are not intimately connected to the features that would alter the USACE project (e.g., concessions being constructed off USACE property by the same entity requesting permission to construct boat access to a USACE reservoir) should not be included in the USACE environmental review.

A number of categorical exclusions that allow completion of the NEPA process in an efficient manner for those activities that individually and cumulatively would not result in significant effects on the environment are included in 33 CFR 230.9. For example, categorical exclusions in 33 CFR 230.9(b) and (i) may have applicability to some of the smaller scale activities that may be encountered under Section 408. Real estate grants for rights-of-way as referenced in 33 CFR 230.9(i) should be broadly interpreted to include grants of rights-of-way by either USACE or the non-federal sponsor. A categorical exclusion may be used for Section 408, provided that care is taken to ensure that the proposed alteration is within the intended scope of the specific categorical exclusion used and extraordinary circumstances that may require the preparation of an Environmental Impact Statement (EIS) or Environmental Assessment (EA) have been taken into consideration. It is recommended that the applicability and use of the categorical exclusion be documented in accordance with recent Council on Environmental Quality (CEQ) guidance, *Establishing, Applying and Revising Categorical Exclusions under the National Environmental Policy Act*.

- 7. Requester Review Plan Requirement.** The district has the flexibility to decide whether or not the requester must prepare a review plan for the alteration for district approval. A review plan is required when a Type II Independent External Peer Review (IEPR) is required. If the district determines, by following procedures in EC 1165-2-214, a Type II IEPR is required, then at minimum the requester is required to submit a Type II IEPR review plan. The Risk Management Center (RMC) will be the Review Management Organization (RMO) and is required to endorse in writing all review plans for Type II IEPRs to ensure that the review plans reflect a level of review commensurate with the scope and scale of the proposed alterations. All requester-generated review plans for Type II IEPRs will be approved by the Division Commander.
- 8. Other Information.** Based on the alteration request, the district may require the requester to provide additional information to complete its evaluation.

- 9. Written Requests.** All requests for Section 408 permission must be submitted in writing to the District Commander of the appropriate USACE District Office having jurisdiction over the USACE project that would be impacted by the alteration. In addition to a hard copy, please submit electronic copies of all information for review.

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