



USACE Section 408 Policy – Engineer Circular 1165-2-220 Summary of Public Comments Received

Background

The U.S. Army Corps of Engineers (USACE) Section 408 policy sets forth the process USACE uses to review requests by other entities, which could be any public or private entity, to alter a USACE Civil Works project. Example reasons to alter a Civil Works project include: a community wanting to increase recreational opportunities; a local project sponsor wanting to improve flood risk management; or a business or utility company seeking to run power lines or pipelines over or through a Civil Works project (also referred to as a USACE project). The purpose of a USACE Section 408 review is to ensure that the congressionally-authorized benefits of a project are protected and maintained (e.g., flood risk management, coastal storm damage reduction, navigation) and to ensure the proposed alteration is not injurious to the public interest. Effective and efficient reviews of proposed alterations for USACE projects protect taxpayer investments while ensuring compatibility with new infrastructure, improvements, and other public or private interests.

USACE issues guidance and procedures as formal publications, such as Engineer Manuals, Engineer Circulars and Engineer Regulations. Each type of publication has a specific scope and expiration requirements. An Engineer Circular (EC) is intended to be interim, valid for two years, but is sometimes extended for a short period. Engineer Circulars are used to allow for revisions before a process or policy is documented in a more long-term publication, which is typically in the format of an Engineer Regulation (ER).

In February 2018, USACE made available for public comment the draft Engineer Circular (EC) 1165-2-220, *Policy and Procedural Guidance for Processing Requests to Alter U.S. Army Corps of Engineers Civil Works Projects Pursuant to 33 USC 408* (Section 408). USACE requested public comment on the draft policy in order to solicit stakeholder input, identify areas of concern, and improve the policy document prior to final publication. Once the revised EC is published, it will be valid for two years, after which it may be revised and re-issued as an EC or converted into an ER.

The intent of EC 1165-2-220 is to establish a framework to consistently and efficiently make decisions on requests to alter USACE projects. EC 1165-2-220 replaces the previous Section 408 guidance document (EC 1165-2-216 issued in 2014), consolidates all interim policy memoranda, clarifies when/where Section 408 applies, solidifies documentation requirements, and ensures that alterations do not impact USACE projects' ability to continue to deliver the intended public benefits. Additionally, the EC changes existing USACE policies to improve the request and review process by more narrowly defining the activities that are subject to the review process set forth in the EC, delegating decision-making authority for certain types of requests, introducing a multi-phased review option for incremental decision-making on complex projects,

implementing timeframes for reviews, and developing a Section 408 database that includes publicly available status information on all Section 408 requests.

In total, USACE received 78 separate comment submissions directly related to Section 408 or EC 1165-2-220 (see appendix for the list of organizations that provided comment). Of the comment submissions received, 29 were submitted by local government organizations, 13 from state government, 2 tribal government, and 1 federal government; the remaining submissions were from businesses/industry (13 submissions), associations (11), non-profits (7), and 2 from individuals with no affiliation. Some comment submissions provided specific feedback on certain aspects of the policy, while other submissions included many comments and discussed all portions of the policy. Note that there were other comment submissions provided that were unrelated to Section 408 or EC 1165-2-220, which were screened out.

The majority of comments received addressed potential ambiguity in requirements of the policy and identified areas for clarification. These comments ranged from typographical errors to specific technical questions to overall program governance. USACE reviewed all comments received and updated EC 1165-2-220 to address the issues identified to provide clarity on the intent of the Section 408 policy where feasible and reasonable. This document does not individually address every comment received. Instead, it identifies common comment topics and concerns and how USACE revised the EC to address the comment or concern.

General Comments

There was general support from commenters on the overall effort to improve the Section 408 review process. Commenters cited the development of categorical permissions as a particularly useful tool to improve the efficiency of approving alterations similar in nature and effect. Others supported the clarification of actions determined to be part of operation and maintenance (and some instances of repair, replacement, rehabilitation) that do not require a Section 408 permission. Additionally, there was broad support for the introduction of multi-phased reviews that provides incremental decision milestones for large and/or complex alteration proposals.

Some commenters felt the requirements were too burdensome and complex. There are concerns that the level of effort required to submit a Section 408 request will be prohibitively resource intensive for those requesting permission to alter projects, or that the requirements are beyond Congressional intent or more appropriate for rulemaking. USACE acknowledges that some alterations will require a significant level of effort to develop the design and for USACE to review. However, the requirements in the EC are intended to be scalable so that they are less burdensome and complex for smaller, more routine alterations. Further, USACE made revisions to the EC, such as paragraphs 13 through 17, to better clarify the overall process. It was suggested that the EC retain the description of the main steps in the process that was included in the previous guidance document, so that information was retained and updated. USACE is issuing this policy as an EC, which is interim by nature, so that the policy can be implemented in the field and USACE can continue to receive feedback and consider additional improvements and clarification, as necessary.

Alternatively, some commenters were concerned that USACE may not have enough staff/resources to train field staff on the new EC, or to efficiently process requests, which could lead to lengthy timeframes for review. Similarly, some commenters were concerned about nationwide consistency. Concurrent with release of this EC, USACE intends to focus on training internal staff to ensure the intent of the new processes are well understood. Training field staff, particularly to address nationwide consistency, and outreach to stakeholders will be priorities for USACE following the release of the EC. USACE continues to monitor workload trends to ensure budget requests are sufficient to execute reviews of Section 408 requests consistent with timelines prescribed in WRDA 2016 and the EC.

Program Governance

Several commenters requested the ability to appeal decisions or to enact dispute resolution procedures for Section 408 requests. USACE appreciates this recommendation; however, given that the new EC includes many improvements intended to be collaborative throughout, in addition to implementation of the Section 408 database for improved documentation, transparency and tracking, USACE would like the opportunity to implement these new processes initially before creating additional processes for appeals or disputes. In addition, USACE is cognizant of trying to reduce and streamline processes to reach decisions. With Section 408 reviews, it is USACE's goal to resolve issues during the process versus creating new and separate processes.

Multiple commenters requested that additional information be made available to the public including: audit reports, Section 408 coordinator contact information, various information to be included in the Section 408 database, and GIS layers showing the locations of USACE projects. Some commenters suggested that HQUSACE standardize information that districts post on their websites. USACE is working to make more information publicly available, including the development of a portal that will allow members of the public to view information on the status of Section 408 requests (expected for release later in calendar year 2018). Many data layers and USACE project information are currently available through CorpsMap (<https://corpsmap.usace.army.mil/>). Along with this additional transparency, USACE will still need to comply with the Privacy Act and cannot disclose certain information to the public that may be sensitive in nature. Therefore, information like personal contact information for requesters will not be displayed publicly.

Many commenters emphasized the need for improved coordination internally within USACE, with non-federal sponsors, and with requesters, including the ability to have pre-application meetings. USACE concurs that coordination, both internally and externally, is a critical component of any Section 408 request and Section 408 coordinators must be adept at this skill. Section 7.h. of the EC was written to emphasize the importance of clear and frequent communication and coordination, and additional clarifying language is included in the final EC to further emphasize this.

Some commenters had questions on the lead district concept for Section 408 requests that cross district boundaries. USACE issued separate guidance on 15 May 2018 clarifying agency-

wide policy and guidance on the use of a lead district for both Section 408 requests and Regulatory permits.

Role of the Non-Federal Sponsor

Many comments were received concerning the role of the non-federal sponsor in a Section 408 request submitted by an independent requester. Comments varied greatly and included concern about not giving sponsors enough time to give feedback, soliciting sponsor feedback too early in the process, and that solicitation of feedback should be mandatory prior to USACE accepting a Section 408 request. Commenters were both in favor of and against the ability to waive the need for a Statement of No Objection (EC paragraph 11.a.) when an independent requester has the ability to exercise eminent domain, and questioned whether condemnation is possible. USACE greatly values the role of the non-federal sponsor for its projects. The non-federal sponsor has unique knowledge of the operations and maintenance of the projects, often is the owner of the land underlying a USACE project, and is vested with multiple responsibilities in ensuring the integrity of these projects. Several changes to the final version were made to clarify when non-federal sponsor feedback is obtained and the purpose of those points of feedback.

The Statement of No Objection is the initial point of feedback. Its purpose is to ensure that the non-federal sponsor is aware of the independent request and does not have concern with the request being submitted to USACE to initiate the Section 408 process. It is important to note that neither the procedures contained within EC 1165-2-220 nor an approved Section 408 permission give an independent entity the ability to condemn property or affect that entity's ability to condemn property. The ability to exercise eminent domain and the conditions for doing so are defined by other applicable laws. Therefore, paragraph 11.a.(4) of the EC still allows USACE to waive the need for this initial point of feedback (within the conditions outlined in the EC) and initiate the process of evaluating the independent Section 408 request, when that independent party has the authority to exercise eminent domain. It is still USACE's intent that independent requesters will first attempt to obtain the Statement of No Objection from the non-federal sponsor and USACE will consider all input from non-federal sponsors throughout its decision process. USACE expects that non-federal sponsors will attempt to work with independent requesters, recognizing that the Statement of No Objection only initiates the Section 408 request and does not limit or foreclose the opportunity for the sponsor to provide additional feedback later during evaluation of the Section 408 request.

Additional language was added throughout the document indicating other points of coordination with the non-federal sponsor, such as clarification that the EC does not supersede existing agreements and/or coordination procedures among USACE districts and non-federal sponsors, and that non-federal sponsors should also receive submittals of as-built drawings.

Alignment with USACE's Regulatory Program

Multiple comments were received suggesting greater coordination and alignment with decision making under USACE's other regulatory authorities including Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and Section 103 of the Marine

Protection, Research, and Sanctuaries Act. Commenters questioned why decision making under these authorities could not be combined further or if a permit decision could be made by the Regulatory Program prior to a decision on a Section 408 permission. Some commenters expressed support for procedures in Appendix G which integrate decision making under Section 408 into Regulatory's Section 10 review. USACE has made a significant effort to improve coordination among its internal offices that conduct Regulatory permit reviews and Section 408 permissions. In May 2018, USACE issued guidance on lead districts covering both the Regulatory Program and Section 408, which has been incorporated into the final version of EC 1165-2-220. Paragraphs 7.h.(4) and (5) were added to the final document to further align decision making in situations in which both a Section 408 permission and a Regulatory Standard Individual Permit are required, including designating one internal lead office for environmental compliance and developing one decision document covering both decisions.

Environmental Compliance

Many commenters were supportive of the additional clarifications on environmental compliance requirements associated with Section 408 requests. Of note, several commenters were supportive of strong language encouraging USACE to adopt or incorporate by reference other available National Environmental Policy Act (NEPA) documents and other environmental compliance. Some commenters requested that the language be altered to mandate adoption of NEPA documents. Both USACE regulations implementing NEPA and the Council on Environmental Quality's (CEQ) regulations strongly encourage adoption and incorporation by reference within NEPA documents. USACE supports these regulations by keeping these strong references in the final EC. While USACE fully expects adoption or incorporation by reference to be normal business practice for NEPA compliance for Section 408 requests, mandating these practices would limit flexibility for those uncommon situations in which these practices may not be appropriate, or may not support efficient completion of environmental compliance for the proposed work.

Some commenters focused on the timing of compliance with NEPA and other resource protection requirements relative to a completeness determination for a Section 408 request. Because completion of NEPA and other resource protection requirements is an inherently governmental function, paragraph 11.d. was revised to only generally describe that documentation and other information to support compliance with NEPA and other resource protection requirements is required as part of a Section 408 request. The intent is that the requester provides the USACE district any information the district initially determines is necessary to initiate that compliance process in order for the Section 408 request to be considered complete, recognizing that there may be additional information needs as the NEPA process and compliance with other resource protection requirements are conducted. Even though the requirement is for requesters to only provide the information for USACE to initiate compliance with resource protection requirements, HQUSACE fully expects districts to work with requesters to initiate NEPA and other resource protection compliance as early during the Section 408 request as feasible. Early application of NEPA is consistent with CEQ's regulations and is particularly critical for those Section 408 requests that trigger the need to prepare an Environmental Impact Statement (EIS) to support timely decision making on Section 408

requests. This includes fully synchronizing the NEPA process and compliance with other resource protection requirements with the gathering of the required information for a complete Section 408 request and into the USACE review and decision step, when necessary. All required NEPA and other resource protection requirements must be completed prior to rendering a decision on the Section 408 request and documented in the summary of findings as described in paragraph 15.b.

Tribal Consultation

Several comments were received requesting stronger language on the role of tribes in the Section 408 process, including clarification that government-to-government consultation cannot be delegated to a non-federal entity, and that consultation is not subject to specific timeframes. USACE concurs with these comments and has made several revisions throughout the EC to better emphasize when tribes should be engaged during a Section 408 request. Paragraph D-3.f. was added to Appendix D to emphasize principles from USACE's Tribal Consultation Policy, including the obligation for pre-decisional government-to-government consultation and for USACE to provide for an open, timely, meaningful, collaborative, and deliberative communication process that emphasizes trust and respect throughout review and decision-making process. This section also clarifies that tribal consultation is not bound nor limited to specific timelines. Paragraph D-4.g.(2) was added to recognize the role tribes can play as a NEPA cooperating agency. Lastly, language was added to various paragraphs within the main body of the EC to emphasize protection of any sensitive information that may have been provided by tribes; and to emphasize that alterations that use a categorical exclusion for NEPA purposes may still require separate tribal consultation.

Engineering and Technical Requirements

Comments on engineering and technical requirements generally focused on the Safety Assurance Review (SAR), the need for a Quality Control Plan (QCP), and drilling plan requirements. Commenters were supportive of having the determination of need for a SAR being done at the district level, but some commenters requested further streamlining of the SAR. USACE recognizes the need for efficient and effective decision making on Section 408 requests and has maintained maximum delegation and flexibility for SARs as is currently feasible in the final version of the EC. Several comments were received indicating that requiring a QCP is burdensome and duplicative, particularly when a Professional Engineer is already signing and sealing documents. USACE has revised the language in paragraph 11.c. to only require the requester to submit a certification that the design underwent a quality control process for those alterations involving professional design services. Commenters expressed concern over obtaining two Section 408 permissions when exploratory drilling is involved in an alteration request, questioning why there is not an expedited path of review for these activities. A clarification was made when the purposes of exploratory would not require obtaining Section 408 permission.

Some additional comments were received requesting additional detail within Appendix E on certain structures such as dry dams and open channels. USACE acknowledges the myriad of different structures and features within its projects and that the Appendix could become

extremely long and complex if specific guidance were given for all potential structures and features. Detail was included on those project features and structures most likely to be involved in a Section 408 request, with the intent that districts will rely on the body of other USACE engineering and technical publications and engineering judgment for other types of project features and structures. Lastly, some questions were received on how the removal of the minimum 60% plans and specifications requirement affected the level of design needed for a Section 408 permission. The minimum 60% plans and specifications requirement in EC 1165-2-216 was the minimum necessary to conduct a review of a Section 408 request, acknowledging that a higher percentage plans and specifications could be required. This requirement was removed because it was recognized that it limited flexibility for districts to initiate the review of some alterations that did not involve complex engineering or design, and the new EC allows for multi-phase reviews for complex projects in lieu of a specific design requirements for an initial request. The removal of the minimum design requirement is to give the districts greater discretion and flexibility on the level of detail needed to proceed to the USACE review and decision step of the Section 408 process. This change from the 2014 policy document to the current EC does not affect USACE discretion to require advanced level of design prior to rendering a decision on the Section 408 permission.

OMRR&R

Many commenters supported revisions clarifying that O&M and certain repair, rehabilitation, and restoration work conducted by a non-federal sponsor does not require Section 408 permission. However, some commenters were not clear on why coordination may still be required with the USACE district and were concerned that coordination would result in a full review process. Revisions were made to paragraph 9.c. to better clarify that coordination with the USACE district is to verify the design or construction approach of such activities based on scope and scale, not to institute a formal review and decision procedure. One commenter also questioned who is responsible for updating the O&M manual if an alteration results in required changes to the manual. Clarifying language was added to paragraph 11.f. indicating the requester will be required to provide the USACE district with sufficient information to update the portion of the O&M manual related to an approved alteration.

Overall Process and Timelines

Multiple comments were received on the overall process, and many commenters were in favor of the timelines. Notably, one commenter indicated that the step-by-step procedures that were in the 2014 document got muddled in the reorganization of the EC. USACE concurs with this comment and has significantly revised paragraphs 13 through 17 to describe step-by-step procedures and how the timelines are integrated into those procedures. The procedure also includes details on engaging the non-federal sponsor during the Section 408 process for third-party requests. Multiple commenters suggested revising the timelines such as including shorter timelines for categorical permissions, implementing a standard 6 month timeline, or allowing default approval for reviews extending beyond a certain timeline. The timelines included in EC 1165-2-220 are taken directly from Section 1156 of WRDA 2016, representing the most recent Congressional intent on timely decision making. USACE intends to track timelines on Section

408 requests using the database and will use that database in the future to inform whether alternate timelines consistent with the intent of the law may be appropriate.

Categorical Permissions

A large variety of commenters were in support of categorical permissions and encouraged USACE to expend additional effort establishing national level categorical permissions and/or developing additional guidance and training for districts on categorical permissions. A few commenters were concerned that categorical permissions could “shortchange” the review process. USACE acknowledges the potential for categorical permissions to provide an effective and efficient review process for alterations that are minor in scope and intends to provide technical support to districts and divisions interested in establishing categorical permissions. USACE initially intends on expending significant resources on training for districts and divisions upon finalization of EC 1165-2-220, but also intends to monitor implementation of the EC to evaluate the potential for development of nationwide categorical permissions. USACE also intends that the quality of the review will not be sacrificed when using a categorical permission. All applicable laws, regulations, and guidance must still be followed for establishment of a categorical permission.

Multi-phase Reviews

Many commenters supported the ability to seek Section 408 permission in multiple phases or milestones. Some commenters were not clear on how the specific phases or milestones would be broken out, or what kind of decision would be received at the end of each milestone. Some commenters were concerned that allowing multi-phase reviews would allow for segmentation or “piecemealing” the review of an alteration, which is not permissible for NEPA analyses. Revisions were made to paragraph 10.c. to clarify that multi-phase reviews may apply to a proposed alteration for which interim reviews are conducted as the level of detail of the information is progressively developed. Each milestone would likely correspond to a certain level of design for the same scope of work, not necessarily only a subcomponent of the proposal or a specific construction phase. The intent is that the district and the requester will work together to determine what milestones are appropriate for a given request. The rationale behind focusing on this scenario is to avoid “piecemealing” or segmenting the review of the whole alteration, but give requesters flexibility on the pace for advancing design. Segmenting will not occur under NEPA, as each milestone will focus on the same work, and generally NEPA compliance through an iterative process that is initiated at the first milestone and updated as the milestones progress. The intent is that districts will use the guidance in Appendix D-4.h. to efficiently conduct NEPA compliance for multi-phase reviews through supplementation, as needed, or by tiering. Paragraph 10.d. was added for the scenario in which there is a long-term or large-scale plan, such as a watershed-based master plan, comprised of the construction of multiple alterations occurring over time. Because these type of Section 408 requests are expected to be uncommon, the policy encourages coordination vertically within USACE for guidance to handle those in the most efficient manner, allowing greater flexibility to adapt to these situations.

Funding Agreements

Commenters were both in favor and not supportive of funding agreements. Those not supportive of funding agreements generally cited issues of perceived fairness, particularly since some entities may not be able to fund an agreement. USACE acknowledges the fairness issue with funding agreements and that not all entities have sufficient funds, ability, or desire to execute a funding agreement. To mitigate this issue in the EC, USACE has carried forward policies on funding agreements that have been applied within the Regulatory Program for the past 18 years, including practices to preserve impartial decision making and principles that expediting the review under a funding agreement should not come at the cost of lower level of service for all other requesters in Appendix I-3.a. and I-3.b. Some commenters in favor of funding agreements requested changes to the funding authorities including extension of expiration dates or the ability to receive federal reimbursement of funds contributed to an agreement. These types of changes would require changes to law and are not within USACE's authority or discretion. Lastly, some commenters requested greater clarification on the benefits of having a funding agreement such as quantifying an expedited timeline. Funding agreements are expected to expedite the review process for the requester. USACE has interpreted "expediting the review process" as inclusive of generally shorter review times as compared to prior to the agreement, and the facilitation of a smoother review process through improved coordination and communication, or through the development or use of programmatic agreements or standard operating procedures. This interpretation is consistent with the Regulatory Program's implementation of Section 214 of WRDA 2000, as amended, over the last 18 years. Entities that have used funding agreements with the Regulatory Program and/or Section 408 in the past have provided feedback to USACE that they value the stronger working relationship with USACE staff, including the ability to better prioritize work among multiple permit applications that comes with a funding agreement. In addition, entities are appreciative of the ability to ensure funds will be available to evaluate their Section 408 requests in case there is limited availability of appropriations at the end of a fiscal year.

Other Topics

Several comments were received on the applicability of EC 1165-2-220. These commenters recommended greater clarification on the geographic limits of applicability including more clarification on what constitutes "in the vicinity" of a USACE project. Multiple commenters recommended that Section 408 only be applied to "built works" or "engineered structures." Some revisions were made to paragraph 9.a. to better clarify the geographical limitations of applicability of the EC. However, the general policy to apply the EC to USACE projects in lieu of just structures is unchanged from the draft document. Using the project boundaries as the area of applicability is necessary because for each project all lands within the project boundary were determined to be necessary to ensure the proper functioning of the project at the time the project was designed and authorized. For instance, many of the built features within a USACE project may require additional land as setback for proper functioning, such as levees. As such, alterations to any of the land within the project boundary have the potential to impact the ability of the project to perform its Congressionally-authorized purpose. This policy continues USACE's application of the Section 408 authority dating back prior to EC 1165-2-216. "In the vicinity" was not further defined, as defining a specific distance that constitutes being "in the vicinity" may not be appropriate for the myriad features that are part of a USACE project. Some

commenters questioned why alterations on USACE-owned lands are not required to follow the EC process. Several revisions were made to paragraph 9.e. to better clarify when USACE's real estate procedures satisfy the requirements of Section 408, in which case a separate permission under EC 1165-2-220 is not required. The process that is followed for a Report and Determination of Availability or a project master plan includes the same level of rigor to the same analyses that would be conducted for a Section 408 request. Therefore, to minimize duplication of analysis, for those alterations that will be carried out entirely within the boundaries of real property of the United States or reservoirs managed by USACE and are either consistent with an approved project master plan or subject to a Report and Determination of Availability, a separate evaluation under the procedures in the EC is not required, as the Real Estate procedures provide the same review and determinations.

Several comments were received on the public notice requirement, mainly requesting that a time limit for public notices be added to the EC. Some commenters requested that public notices should not be required for all Section 408 requests, and other commenters requested clarification on timing of the public notice. Language was added to paragraph 12.b. of the EC to indicate that the comment period associated with the public notice should generally be no more than 30 calendar days, but may deviate from the 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. The intent is to afford sufficient opportunity for the public to comment on the proposal and reduce or eliminate the need for multiple public notices, while keeping the review process moving consistent with timelines prescribed in WRDA 2016 and the EC. Guidance requiring a public notice for all Section 408 requests, other than those requests that will be validated under an established categorical permission, is retained in the final EC. The purpose of the public notice is to provide greater transparency, and solicit public input that will help inform USACE's required determination on all Section 408 requests whether the alteration is injurious to the public interest, as well as meet a variety of other requirements (e.g., NEPA, E.O. 11988 compliance, etc.) that may apply to a particular Section 408 request. USACE anticipates that the guidance given that public notices should be no more than 30 calendar days will limit delays in review as a result of extended comment periods. Timing of the public notice is intentionally flexible in order to maximize opportunities for concurrent/joint public notices and can occur whenever the district has sufficient substantive information on the alteration to solicit input, which may be during the Completeness Determination step (paragraph 14) or the USACE Review and Decision step (paragraph 15). Notwithstanding this inherent flexibility, paragraph 12.b. recommends the public notice be circulated 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.

Multiple comments were received requesting greater clarity on the decision making criteria for determining whether an alteration impacts the usefulness of the project or is injurious to the public interest. Commenters felt these criteria were subjective, and made suggestions for revising the criteria including greater consideration of cumulative impacts to the public interest; greater consideration of the non-federal sponsor's O&M responsibilities; and inclusion of changing the project's priorities or reducing a project purpose as a reason for denial. USACE

acknowledges the challenge in developing clear, “bright line” criteria for decision making that are consistent with the statutory language of Section 408. While some of the suggestions may be significant factors for consideration on any given Section 408 request, USACE has not made any significant revisions to the decision-making criteria within EC. The intent is to give districts sufficient discretion and flexibility to adapt the criteria to the multitude of alterations and USACE projects across the Nation. USACE intends to monitor how districts apply these criteria through the audit process in the Program Governance section of the EC to ensure they are being applied fairly and within reasonable consistency nationwide.

Several commenters also made suggestions for the summary of findings document, particularly including information on timelines and the conclusion of environmental compliance other than NEPA. Commenters also recommended minimizing documentation requirements for the summary of findings. The EC provides the minimum required information for the summary of findings. Districts have discretion to include additional information, such as documentation of compliance with timelines. USACE intends on tracking nationwide compliance with timelines through the Section 408 database which will automatically calculate days elapsed from the completeness determination; therefore, mandating a timeline discussion in the summary of findings document was unnecessary. The EC encourages integration of the NEPA decision document into the summary of findings, but also should include the conclusions of other applicable environmental compliance consistent with paragraph 15.b.(12).

A couple commenters were concerned that the EC was not consistent with USACE’s Memorandum of Understanding (MOU) with the Federal Energy Regulatory Commission (FERC) on hydropower development. These same commenters requested better alignment of Section 408 with FERC’s hydropower licensing. A review was conducted and some minor clarifications were made to ensure consistency between the EC and the MOU.

Organizations that provided comments on EC 1165-2-220:

Ameren
American Association of State Highway and Transportation Officials
American Rivers
American Rivers
Arizona Game and Fish Department
Associated General Contractors of America
Association of American Railroads
Association of Metropolitan Water Agencies
California Central Valley Flood Control Association
California Central Valley Flood Protection Board
California High-Speed Rail Authority
City of Galena
City of Los Angeles Bureau of Engineering
City of Phoenix
Clark County Regional Flood Control District
Coalition to Protect the Missouri River
Coastal Protection and Restoration Authority Board
Consolidated North County Levee District
Contra Costa County Public Works: Flood Control & Water Conservation District
DCM Policy Consulting
Fabius River Drainage District
Flood Control District of Maricopa County
Floodplain Alliance for Insurance Reform
Georgia Department of Transportation
Holliday Sand & Gravel Company, LLC
Hydro Green Energy
Illinois Farm Bureau
Interstate Natural Gas Association of America
Iowa Department of Transportation
JEO Consulting Group, Inc
Kings River Conservation District
Lathrop Gage
Lehigh Hanson Materials Limited
Los Angeles County Public Works
Lower Platte South NRD
Lower Sacramento River Delta North Region
Minnesota Department of Transportation
Mississippi Levee Board
Mississippi Valley Flood Control Association
Missouri Department of Natural Resources
Missouri Department of Transportation
Montana-Dakota Utilities Company

Multnomah County Drainage District #1
National Association of Flood & Stormwater Management Agencies
National Hydropower Association
National Water Supply Alliance
National Waterways Conference
Ohio Department of Transportation
Oklahoma Department of Transportation
Osage Nation
Pacific Northwest Waterways Association
Papio-Missouri River Natural Resources District
Pennsylvania Department of Transportation
Pike and Scott County Farm Bureaus
Port of Houston Authority
Rye Development
San Bernardino County Flood Control District
San Bernardino Department of Public Works
Scappoose Drainage Improvement Company
Sny Island Drainage District
South River Drainage District
Southern California Edison
Southwestern Illinois Flood Prevention District Council
Spire Energy
St. Francis Levee District
Tarrant Regional Water District
Tensas Basin Levee District
Texas Department of Transportation
Two Rivers Levee & Drainage District
Union Pacific Railroad Company
United South and Eastern Tribes Sovereignty Protection Fund
United States Coast Guard Bridge Program
Utility Water Act Group
Village of Milan
VNF Solutions
Water Forum