



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

CECW-CE

JUN 02 2017

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Implementation Guidance for Section 1007 of the Water Resources Reform and Development Act of 2014 (WRRDA 2014), Expediting Approval of Modifications and Alterations of Projects by Non-Federal Interests and Section 1156 of the Water Resources Development Act of 2016 (WRDA 2016), Structures and Facilities Constructed by Secretary

1. Background.

a. Section 14 of the Rivers and Harbors Act of 1899, as amended, (33 U.S.C. 408) makes it unlawful for any entity to alter or in any manner impair the usefulness of a U.S. Army Corps of Engineers (USACE) Civil Works project, unless the Secretary of the Army grants permission for such alteration after making certain findings. Specifically, the Secretary may, upon the recommendation of the Chief of Engineers, grant permission to entities for the permanent or temporary alteration or use of a USACE Civil Works project, if the Secretary determines that the requested alteration is not injurious to the public interest and will not affect the USACE project's ability to meet its authorized purpose in order to continue to deliver public benefits as intended. The process and procedures for making a decision on Section 408 requests are set forth in Engineer Circular (EC) 1165-2-216, Policy and Procedural Guidance for Processing Requests to Alter U.S. Army Corps of Engineers Civil Works Projects Pursuant to 33 U.S.C. 408. This EC has an expiration date of 30 September 2017.

b. Section 1007 of WRRDA 2014 requires that the Secretary establish a process, after providing notice and opportunity for comment, for carrying out reviews of requests pursuant to 33 U.S.C. 408 (Section 408). It provides for the establishment of benchmark goals (timelines) for determining if a request is complete and for making a final decision. It also includes notification requirements on the status of requests. In addition, Section 1007 requires the creation of a publicly available database that includes the status of Section 408 requests received. Section 1007 is enclosed.

c. Section 1156 of WRDA 2016 amends both 33 U.S.C. 408 and Section 1007 of WRRDA 2014. It requires that, to the maximum extent practicable, review and approval of an activity being evaluated pursuant to Section 408 occur concurrently with any National Environmental Policy Act (NEPA) review of

CECW-CE

SUBJECT: Implementation Guidance for Section 1007 of the Water Resources Reform and Development Act of 2014 (WRRDA 2014), Expediting Approval of Modifications and Alterations of Projects by Non-Federal Interests and Section 1156 of the Water Resources Development Act of 2016 (WRDA 2016), Structures and Facilities Constructed by Secretary

the activity. Section 1156 requires that if USACE is not the lead federal agency for the NEPA review, then USACE should, to the maximum extent practicable, participate as a cooperating agency and adopt and use the NEPA document that is prepared by the lead agency. Further, in the case in which the activity being reviewed for a Section 408 permission is subject to approval by the Secretary under another authority, including those implemented by the USACE Regulatory Program, Section 1156 directs that the reviews be coordinated and carried out concurrently to the maximum extent practicable. In such cases, the Secretary is also directed to adopt and use any document prepared by USACE to comply with a specific law (e.g., NEPA or the Endangered Species Act) that addresses the same geographic area and that is determined to be current and applicable. Section 1156 also establishes timelines for determining if a request is complete and for making a final decision. Section 1156, in addition, provides authority to accept and expend funds from non-federal public and private entities for Section 408 reviews. Section 1156 is enclosed.

2. CECW-CE is revising the process in EC 1165-2-216 to include lessons learned from application experiences and to implement requirements in Section 1007 of WRRDA 2014 and Section 1156 of WRDA 2016.

a. CECW-CE will provide a notice and opportunity for comment on the revision of the Section 408 process in accordance with Section 1007(b) of WRRDA 2014 and Administration guidance related to development of federal policies and regulations.

b. Both Section 1007 and Section 1156 specify timelines within which USACE should: determine if a submitted Section 408 request is complete; make a decision to approve or disapprove a complete application; notify the applicant if the timeline for a decision will not be met; and notify Congress if a timeline for a decision will not be met. However, the timelines and notification requirements in Section 1007 and Section 1156 are inconsistent and conflict with one another. USACE will incorporate the timelines and notification requirements of the more recent legislation into the revised Section 408 process.

c. In conjunction with the revised Section 408 process, a publicly available database will be developed to track Section 408 requests and the status of those requests.

CECW-CE

SUBJECT: Implementation Guidance for Section 1007 of the Water Resources Reform and Development Act of 2014 (WRRDA 2014), Expediting Approval of Modifications and Alterations of Projects by Non-Federal Interests and Section 1156 of the Water Resources Development Act of 2016 (WRDA 2016), Structures and Facilities Constructed by Secretary

d. A revised Section 408 process in the format of another EC is expected to be available on or before 30 September 2017.

e. Interim guidance may be issued prior to a revised Section 408 process if it relates to streamlining the Section 408 process or would result in no increase in time and cost to requesters or USACE. Any interim guidance will be incorporated into the revised comprehensive Section 408 policy document.

3. Questions regarding this implementation guidance should be directed to Tammy Conforti, Special Assistant for Levee Safety, Engineering and Construction Division, at (202) 761-4649 or Tammy.Conforti@usace.army.mil.



JAMES C. DALTON, P.E.
Director of Civil Works

Encl

DISTRIBUTION:

COMMANDERS, REGIONAL BUSINESS AND PROGRAMS DIRECTORS,
GREAT LAKES AND OHIO RIVER DIVISION, CELRD
MISSISSIPPI VALLEY DIVISION, CEMVD
NORTH ATLANTIC DIVISION, CENAD
NORTHWESTERN DIVISION, CENWD
PACIFIC OCEAN DIVISION, CEPOD
SOUTH ATLANTIC DIVISION, CESAD
SOUTH PACIFIC DIVISION, CESP
SOUTHWESTERN DIVISION, CESWD

WRRDA 2014 Section 1007. Expediting Approval of Modifications and Alterations of Projects by Non-Federal Interests.

(a) SECTION 14 APPLICATION DEFINED.—In this section, the term “section 14 application” means an application submitted by an applicant to the Secretary requesting permission for the temporary occupation or use of a public work, or the alteration or permanent occupation or use of a public work, under section 14 of the Act of March 3, 1899 (commonly known as the “Rivers and Harbors Appropriation Act of 1899”) (33 U.S.C. 408).

(b) REVIEW.—Not later than 1 year after the date of enactment of this Act, the Secretary, after providing notice and an opportunity for comment, shall establish a process for the review of section 14 applications in a timely and consistent manner.

(c) BENCHMARK GOALS.—

(1) ESTABLISHMENT OF BENCHMARK GOALS.—In carrying out subsection (b), the Secretary shall—

(A) establish benchmark goals for determining the amount of time it should take the Secretary to determine whether a section 14 application is complete;

(B) establish benchmark goals for determining the amount of time it should take the Secretary to approve or disapprove a section 14 application; and

(C) to the extent practicable, use such benchmark goals to make a decision on section 14 applications in a timely and consistent manner.

(2) BENCHMARK GOALS.—

(A) BENCHMARK GOALS FOR DETERMINING WHETHER SECTION 14 APPLICATIONS ARE COMPLETE.—To the extent practicable, the benchmark goals established under paragraph (1) shall provide that—

(i) the Secretary reach a decision on whether a section 14 application is complete not later than 15 days after the date of receipt of the application; and

(ii) if the Secretary determines that a section 14 application is not complete, the Secretary promptly notify the applicant of the specific information that is missing or the analysis that is needed to complete the application.

(B) BENCHMARK GOALS FOR REVIEWING COMPLETED APPLICATIONS.—To the extent practicable, the benchmark goals established under paragraph (1) shall provide that—

(i) the Secretary generally approve or disapprove a completed section 14 application not later than 45 days after the date of receipt of the completed application; and

(ii) in a case in which the Secretary determines that additional time is needed to review a completed section 14 application due to the type, size, cost, complexity, or impacts of the actions proposed in the application, the Secretary generally approve or disapprove the

application not later than 180 days after the date of receipt of the completed application.

(3) NOTICE.—In any case in which the Secretary determines that it will take the Secretary more than 45 days to review a completed section 14 application, the Secretary shall—

(A) provide written notification to the applicant; and

(B) include in the written notice a best estimate of the Secretary as to the amount of time required for completion of the review.

(d) FAILURE TO ACHIEVE BENCHMARK GOALS.—In any case in which the Secretary fails to make a decision on a section 14 application in accordance with the process established under this section, the Secretary shall provide written notice to the applicant, including a detailed description of—

(1) why the Secretary failed to make a decision in accordance with such process;

(2) the additional actions required before the Secretary will issue a decision; and

(3) the amount of time the Secretary will require to issue a decision.

(e) NOTIFICATION.—

(1) SUBMISSION TO CONGRESS.—The Secretary shall provide a copy of any written notice provided under subsection (d) to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives.

(2) PUBLIC AVAILABILITY.—The Secretary shall maintain a publicly available database, including on the Internet, on—

(A) all section 14 applications received by the Secretary; and

(B) the current status of such applications.

WRDA 2016 Section 1156. STRUCTURES AND FACILITIES CONSTRUCTED BY SECRETARY.

(a) IN GENERAL.—Section 14 of the Act of March 3, 1899 (30 Stat. 1152, chapter 425; 33 U.S.C. 408), is amended—

(1) by striking “That it shall not be lawful” and inserting the following:

“(a) PROHIBITIONS AND PERMISSIONS.—It shall not be lawful”; and

(2) by adding at the end the following:

“(b) CONCURRENT REVIEW.—

“(1) NEPA REVIEW.—

“(A) IN GENERAL.—In any case in which an activity subject to this section requires a review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), review and approval of the activity under this section shall, to the maximum extent practicable, occur concurrently with any review and decisions made under that Act.

“(B) CORPS OF ENGINEERS AS A COOPERATING AGENCY.— If the Corps of Engineers is not the lead Federal agency for an environmental review described in subparagraph (A), the Corps of Engineers shall, to the maximum extent practicable and consistent with Federal laws—

“(i) participate in the review as a cooperating agency (unless the Corps of Engineers does not intend to submit comments on the project); and

“(ii) adopt and use any environmental document prepared under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) by the lead agency to the same extent that a Federal agency could adopt or use a document prepared by another Federal agency

“(I) the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.); and

“(II) parts 1500 through 1508 of title 40, Code of Federal Regulations (or successor regulations).

“(2) REVIEWS BY SECRETARY.—In any case in which the Secretary must approve an action under this section and under another authority, including sections 9 and 10 of this Act, section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344), and section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. 1413), the Secretary shall—

“(A) coordinate applicable reviews and, to the maximum extent practicable, carry out the reviews concurrently; and

“(B) adopt and use any document prepared by the Corps of Engineers for the purpose of complying with the same law and that addresses the same types of impacts in the same geographic area if such document, as determined by the Secretary, is current and applicable.

“(3) CONTRIBUTED FUNDS.—The Secretary may accept and expend funds received from non-Federal public or private entities to evaluate under

this section an alteration or permanent occupation or use of a work built by the United States.

“(c) TIMELY REVIEW.—

“(1) COMPLETE APPLICATION.—On or before the date that is 30 days after the date on which the Secretary receives an application for permission to take action affecting public projects pursuant to subsection (a), the Secretary shall inform the applicant whether the application is complete and, if it is not, what items are needed for the application to be complete.

“(2) DECISION.—On or before the date that is 90 days after the date on which the Secretary receives a complete application for permission under subsection (a), the Secretary shall—

“(A) make a decision on the application; or

“(B) provide a schedule to the applicant identifying when the Secretary will make a decision on the application.

“(3) NOTIFICATION TO CONGRESS.—In any case in which a schedule provided under paragraph (2)(B) extends beyond 120 days from the date of receipt of a complete application, the Secretary shall provide to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives an explanation justifying the extended timeframe for review.”.

(b) GUIDANCE.—Section 1007 of the Water Resources Reform and Development Act of 2014 (33 U.S.C. 408a) is amended by adding at the end the following:

“(f) GUIDANCE.—

“(1) IN GENERAL.—Not later than 120 days after the date of enactment of this subsection, the Secretary shall issue guidance on the implementation of this section.

“(2) INCORPORATION.—In issuing guidance under paragraph (1), or any other regulation, guidance, or engineering circular related to activities covered under section 14 of the Act of March 3, 1899 (30 Stat. 1152, chapter 425; 33 U.S.C. 408), the Secretary shall incorporate the requirements under this section.

“(g) PRIORITIZATION.—The Secretary shall prioritize and complete the activities required of the Secretary under this section.”