ENVIROMENTAL AUTHORIZATIONS FOR FEDERAL NAVIGATION AND COASTAL STORM DAMAGE REDUCTION PROJECTS

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TOPICS

• Environmental Operating Principles
• Environmental Laws
  • Fed vs. Non-Fed projects
• Section 408
• Final Points
Environmental Operating Principles

1. Strive to Achieve Environmental Sustainability

2. Consider Environmental Consequences

3. Seek Balance and Synergy

4. Accept Responsibility

5. Assess and Mitigate Cumulative Impacts

6. Understand the Environment

7. Respect Other Views
ENVIRONMENTAL LAWS AFFECTING CORPS’ COASTAL PROJECTS

- National Environmental Policy Act
- Fish and Wildlife Coordination Act (USFWS)
- Clean Water Act (NCDWR/Corps)
- Coastal Zone Management Act (NCDCM)
- Marine Protection, Research & Sanctuaries Act (EPA)
- Coastal Barrier Resources Act (USFWS)
- Clean Air Act (State)
- Endangered Species Act (USFWS and NMFS)
- Magnuson-Stevens Fishery Management & Conservation Act (NMFS)
- Migratory Bird Treaty Act (USFWS)
- National Historic Preservation Act (SHPO)
- Etc……
NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

- EFH
- MSFMCA
- NHPA
- CWA
- ESA
- MPRSA
- CAA
- FWCA
- CZMA
CEQ Master Regulations for all federal agencies

- 40 CFR 1500-1508
- Promulgated in 1978

- Corps-Specific
  Civil Works/Federal Projects
  - 33 CFR 230
  - ER 200-2-2

- Regulatory Permits
  - 33 CFR 325 Appendix B
    (points back to 33 CFR 230)
National Environmental Policy Act of 1969

- Applies to all Federal Actions
  - Federal Projects
  - Federal Funding
  - Federal Permit or Authorization
- Requires
  - Environmental Impact Statement or
  - Environmental Assessment or
  - Categorical Exclusion
- Emergency Procedures
NEPA is Different from other Environmental Laws

- Does not manage or protect one or more specific resources (unlike ESA, CWA, CAA, etc).
- Requires Federal agencies to **CONSIDER** and **DOCUMENT** the environmental impacts of their proposed actions as part of an agency’s **OVERALL** planning and decision-making.
- Requires Federal agencies to cooperate with Federal, state and local governments, and other concerned public and private organizations and citizens during project planning.
  - Recent cooperating agencies – BOEM and NPS
NEPA

- Relies heavily on other environmental laws, standards, policies, plans, programs, permits and conditions for decision criteria, monitoring, follow through, and enforcement; avoid, minimize, mitigate

- Federal officials are not required to adopt the most environmentally acceptable alternative; therefore NEPA imposes procedural, not substantive, decision making requirements.

- Agency NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. Requires full and open disclosure of all facts used in making the decision

- A court may reverse an agency’s decision under NEPA if the agency’s decision was:
  - arbitrary
  - capricious
  - an abuse of discretion or otherwise not in accordance with process & law.
Compliance
Federal vs. Non-Federal Projects

- Coastal Zone Management Act
  - Federal Consistency Determination and Concurrence from State (DCM)
  - Non-Federal – permit issued by DCM

- Coastal Barrier Resources Act (CBRA)
  - No Federal funds may be expended in CBRA zone (navigation exception) - can’t remove sand from a CBRA zone
  - This constraint does not apply to non-feds

- Section 404 of Clean Water Act
  - Corps does not issue itself 404 permits, but still complies w/ 404
  - Non-feds- required to obtain 404 permits for impacts to waters/wetlands

- Endangered Species Act (Section 7)
  - Some Biological Opinions (NMFS & USFWS) apply to both Federal and Non-Federal projects (dredging and new programmatic beach BO)

- Sediment Compatibility (beaches)
  - Federal projects – criteria is 90% sand
  - Non-Fed projects – CRC sediment criteria
COMPLIANCE FINAL POINTS

• Numerous environmental laws and regulations
• Projects involve many agencies and stakeholders
• Communication is key – beginning (NEPA scoping) to project completion (50-year projects)
• Relationships, Trust, and Integrity are critical
• Sharing of Information
SECTION 408

33 USC 408 (Section 14 of the Flood Control Act of 1899)
Engineer Circular (EC) 1165-2-216

Provides the Secretary of the Army authority to grant permission to alter a Corps’ civil works project if

1. *Does not impair usefulness of the project*
2. *Not injurious to the public interest*
PURPOSE OF EC 1165-2-216

• Improve consistency in the way the Corps considers, processes, and documents decisions for requests for alterations to Civil Works projects.

• Create a process that is applicable to all types of Civil Works projects.

• Be transparent regarding what information is required.

• Create a process that can be tailored by districts to the appropriate scope, scale, and complexity of a proposed alteration.
SECTION 408 APPLIES TO:

- All Corps’ Civil Works projects
- Alterations within real estate interests of a Corps’ project
- Actions that build upon, alter, improve, move, occupy, or otherwise could affect a Corps’ project
  - dredging or beach renourishment by non-federal entities
SECTION 408 DOES NOT APPLY TO:

• Routine operations and maintenance activities

• Shoreline Management and Master Planning Programs (Dams and Lakes- Landuse Review Process)

• Certain Real Estate Outgrants
BASIC STEPS

Step 1: Pre-Coordination
Step 2: Written Request to Corps
Step 3: Required Documentation (plans/analyses/NEPA)
Step 4: District Agency Technical Review
Step 5: Summary of Findings (report)
Step 6: Division Review, if required
Step 7: HQ Review, if required
Step 8: Notification by Corps
Step 9: Post-Permission Oversight
COORDINATION WITH REGULATORY

- When a Section 408 request also requires other permits, such as Section 10 (navigable waters)/Section 404 (wetlands)/Section 103 (MPRSA), close coordination throughout is required.

- Section 10/404/103 decisions are separate decisions and require separate decision documentation.

- Information should be leveraged between the two processes (Civil Works and Regulatory).

- “Injurious to the public interest” for Section 408 is not the same as “contrary to the public interest” for Section 10/404/103.

- Section 408 decision must be made before the Section 10/404/103 decision is issued.
ENVIROMENTAL COMPLIANCE

• A Section 408 decision is a federal action and NEPA and other environmental compliance is required.

• Scope of analysis limited to the federal project areas that would be directly or indirectly affected by proposed alteration.

• NEPA documentation – the requester’s proposal will be identified as the “requester’s preferred alternative.”

• Alternatives analysis is limited to 1) no action and 2) requester’s preferred alternative.

• Categorical Exclusions may apply

• Leverage existing NEPA documentation
ROLE OF THE NON-FEDERAL SPONSOR

Because non-federal sponsors are cost-share partners and/or have O&M responsibilities

- Section 408 requests must come from or have written concurrence of the non-federal sponsor
- If there are multiple sponsors, each sponsor must provide concurrence
- Written acknowledgment and acceptance of any new O&M requirements
KEY POINTS

• Every Corps District has a Section 408 Coordinator
• Process is led by the Corps District office
• 408 process is intended to be scalable, based on the scope and scale of the proposed alteration
• Complex/large-scale 408s are funded by the requester
• Coordination throughout the process is encouraged
• Section 408 may be initiated by a letter to the District Commander or a Section 404 permit application
• Section 408 timeframe for completion varies depending on size/complexity of project.
  ▪ Minimum time = 30 days from receipt of all info required to render a decision
  ▪ 2 years+= complex, controversial projects
CLOSING POINTS

• Open, honest (transparent), communication is key
• Sharing of Information is critical
• We can work through almost any obstacle/challenge- collaborate, partner, mutual respect and understanding
• Greatest Challenge – Declining (or $0) Federal funding for Federal navigation and CSDR projects & minimal funding for 408s
QUESTIONS?

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