

The “Other” Permit

Section 408

Section 408

- RHA 1899
 - Section 10—construction in or over navigable waters
 - Section 14— Occupying, alternation, or use of a civil works project
 - Codified in 33 USC 408—now termed “Section 408” permit (WRRDA 2014 referred to this as “Section 14”)

Section 408

- Historical and predominate use: flood control, to control modifications to levees and other structures
- Now increasingly applied to navigation projects
- Section 408 is an engineering “permission”, not a regulatory permit

408 and Navigation

- Recent policy guidance from HQ
 - Procedures still being developed at the district level
- Possible applicability:
 - deepening of berthing areas
 - deepening a channel leading to a berth
 - minor repairs to placement areas allowed by PCA/PPA;
 - directionally drilled pipelines or conduits under placement areas, and more

Implications and Problems

- Section 408 report is performed by Corps Engineering Division
 - Little or no O&M funding may be available
 - 408 report may require ATR, IEPR
 - Requires NEPA coordination
 - Must be coordinated and approved by Regulatory office
- Complete implementing policy might not be available for another year

Where it gets tricky

- 408 approval for major projects has not been delegated; approvals are made at HQ
 - 408 report requires detailed design
 - 408 report must be approved before a 404/10 permit is issued
 - Approval of the 408 report does not guarantee issuance of a permit
 - District must prepare an EA; this may be a different EA than would be prepared for the Section 10 permit
 - Section 214 agreements (and funds) might not be used to work the 408 permit

Recommendations

- Determine if a 408 permit will be required before a project starts
- Ensure Corps coordinates well internally. Discuss the Corps' implementation plan; focus on schedule.
- Push for delegation of authority to the district for navigation projects
- Consider developing/executing an agreement to provide funding to the Corps now

Good news about WRRDA 2014

- WRRDA 2014 requires the Corps to:
 - Establish processes for expeditious review
 - Report to the project applicant regarding schedules
 - Report to Congress if maximum approval time are not met
- Legislation might push Corps to delegate authority, or limit the applicability of Section 408 to minor projects or potential impacts