



Section 408 Permitting Update



Presented by

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Overview

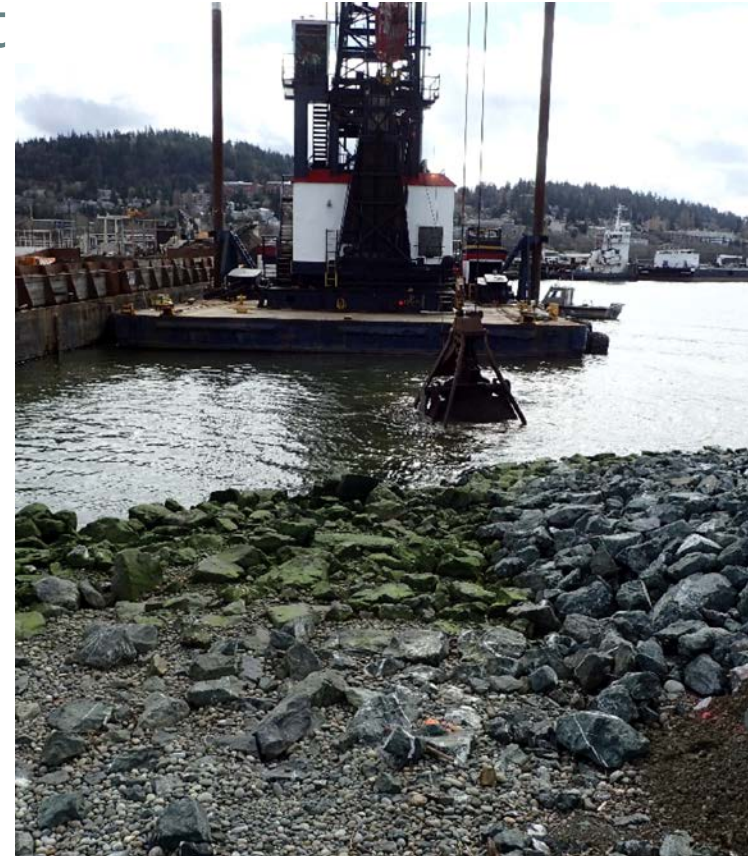
- Section 408 and applicability
- New USACE guidance
- Recent experiences

What Is Section 408?

- Section 14 of the Rivers and Harbors Act of 1899 as codified in 33 United States Code (USC) 408
- Allows other entities to alter or occupy a USACE Civil Works project without Congressional reauthorization
- Enacted to ensure that proposed alterations:
 - Continue to deliver **public benefits** and have no unintended negative impacts to the public
 - Ensures new infrastructure is **compatible**
 - Will not impair the **usefulness** of the project

Why Should I Care?

- Section 408 now required as part of USACE environmental permitting
- Affects permitting schedules and costs
 - Non-federal sponsors
 - Cost-share partners
 - O&M responsibilities
 - Real property owners
 - Private parties



What Does Section 408 Apply to?

- All USACE Civil Works projects
 - Navigation channels, river levees, sea dikes, pile dikes, dams
- *Alteration: Any action by any entity other than USACE that builds upon, alters, improves, moves, obstructs, or occupies an existing USACE project. "Alteration" also includes "occupation" and "use."*
- It does **not** apply to routine operations and maintenance activities by USACE or non-federal sponsor



USACE Role



- Executive Order 11988
- Technical review
- Summary of Findings
- National Environmental Policy Act
- Endangered Species Act compliance
- 106 National Historic Preservation Act of 1966
- Tribal coordination

Role of Applicant

- Technical analysis
- Environmental analysis
- Real estate analysis
- Supporting documents
- Safety assurance reviews
- Operations and maintenance
- Funding (Section 214 of WRDA 2000)





USACE Regulatory Coordination

- Section 408 requests are handled by the USACE Navigation Program
 - However, there is close coordination with Regulatory
 - Some reviews *may be* handled by Regulatory
- To date, Section 10/404 permits have been separate decisions requiring separate documentation
- Section 408 decision must be made before a Section 10/404 permit decision is issued
- Regulatory funds have been only used for Section 10/404 review

Expected Time Frames and Cost

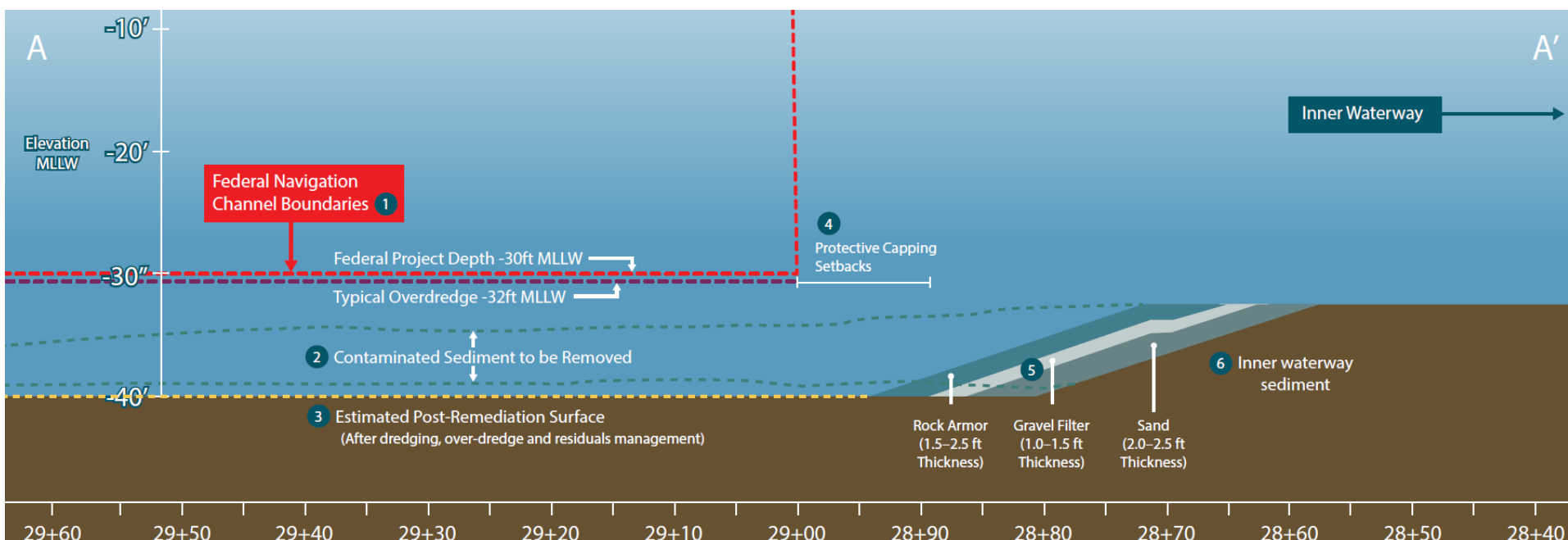
- Historically, from written request to 408 permission:
 - District Decision Level – 6 to 12 months
 - Sometimes required cost sharing agreement under WRDA 214
 - HQ Decision Level – 18 months to 2 years or more
 - Required WRDA 214 agreement to cover USACE review costs
- New Engineering Circular timeframes



Pop Quiz

Example: A non-federal sponsor proposes dredging in the navigation channel deeper than the authorized navigation depth.

Question 1: Does this trigger 408 review?



Pop Quiz

Federal Guidance: *“Maintenance and repair activities by non-federal sponsors do not require Section 408 permission.”*

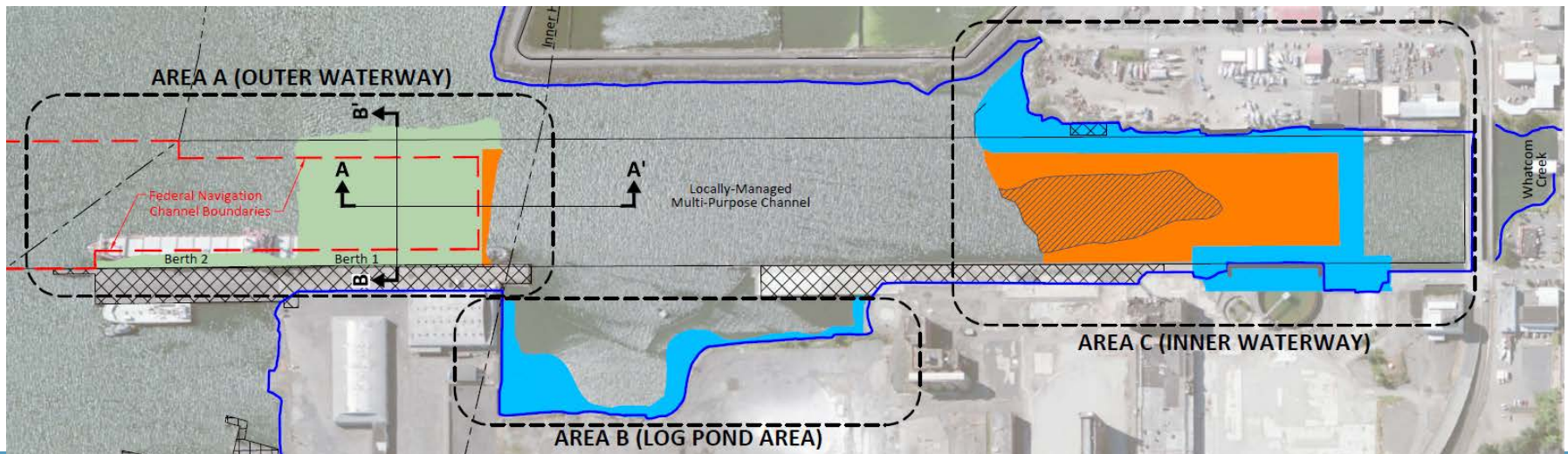
Example: A private party proposes to conduct routine O&M dredging within a federal navigation channel.

Question 2: Is Section 408 review triggered?

Pop Quiz

Example: Elements of proposed work are near but outside the federal navigation channel.

Question 3: Are these activities included in the USACE review under Section 408?



Updated Section 408 Guidance

Engineer Circular 1165-2-220

Water Resources Policies and Authorities

POLICY AND PROCEDURAL GUIDANCE FOR PROCESSING REQUESTS TO ALTER US ARMY CORPS OF ENGINEERS CIVIL WORKS PROJECTS PURSUANT TO 33 USC 408

10 September 2018

Note: Expires 30 September 2020

DEPARTMENT OF THE ARMY
US Army Corps of Engineers
Washington, DC 20314-1000

EC 1165-2-220

Circular
No. 1165-2-220

EXPIRES 30 SEPTEMBER 2020
Water Resource Policies and Authorities
POLICY AND PROCEDURAL GUIDANCE FOR PROCESSING REQUESTS
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Engineer Circular (EC) 1165-2-220

- Replaces EC 1165-2-216 issued in 2015; includes comments on draft EC 1165-2-220 (March 2018)
- Describes requirements and procedures for review
- Process is intended to be tailored to the scope, scale, and complexity of individual alterations
- Provides infrastructure-specific considerations for dams, levees, floodwalls, flood risk management channels, and navigation projects
- EC 1165-2-220 can be found through this [link](#) or www.publications.usace.army.mil by searching under "Engineer Circulars"

EC 1165-2-220

- Key updates
 1. Delegation of all decisions from HQ
 2. Statement of no objection
 3. Clarifications of activities requiring review
 4. Joint decision for 408 and USACE regulatory
 5. Review timelines
 6. Multi-phased reviews
 7. Elimination of 60% minimum design
 8. Section 408 tracking database

1. Delegation of Decisions

- Delegation of all decisions from Headquarters (HQ)
- District Commanders can further delegate 408 decisions
- HQ involved when:
 - Nature of 408 request is without precedent
 - 408 review deviates from policy
 - Whenever any question related to appropriate course of action
- Designation of a lead USACE district for multi-district projects

2. Statement of No Objection

- Projects not being completed by the USACE or non-federal sponsors must have written concurrence of the non-federal sponsor
 - “Statement of No Objection”
- If there are multiple sponsors, each sponsor must provide a “statement of no objection” and acceptance of any new O&M requirements



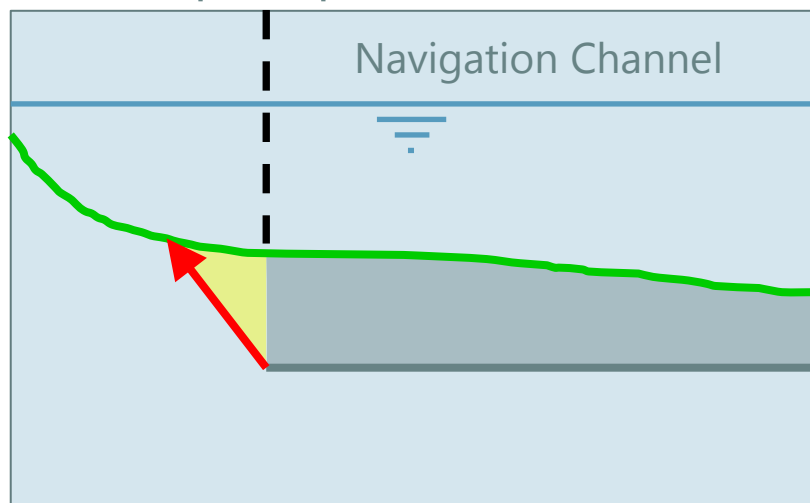
Recent Project – Statement of No Objection

- Sponsor ports asked to provide concurrence with proposed dike modifications
 - New expectation of USACE
 - Concern over perceptions at controversial projects
 - Scope of “no objection”
 - USACE proposed 30-day response period
 - No response = “no objection”
- Procedures for future projects

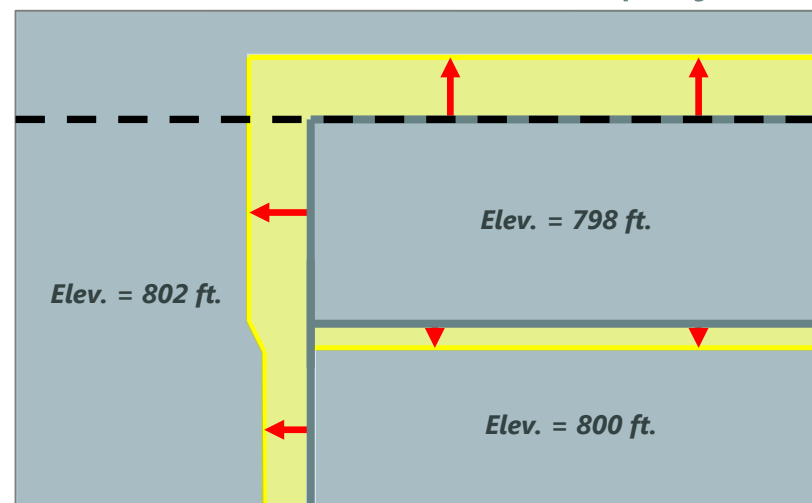
Your recent experiences?

3. 408 Review Clarifications

- Activities in navigable waters (Appendix G)
 - 408 review not required for navigation channel maintenance dredging by USACE or non-federal sponsor
 - Project specific setbacks for maintenance dredging
 - Over-depth, advanced maintenance, and side slopes
 - Equipment clearance
 - Open question for activities near but not within federal project



Section



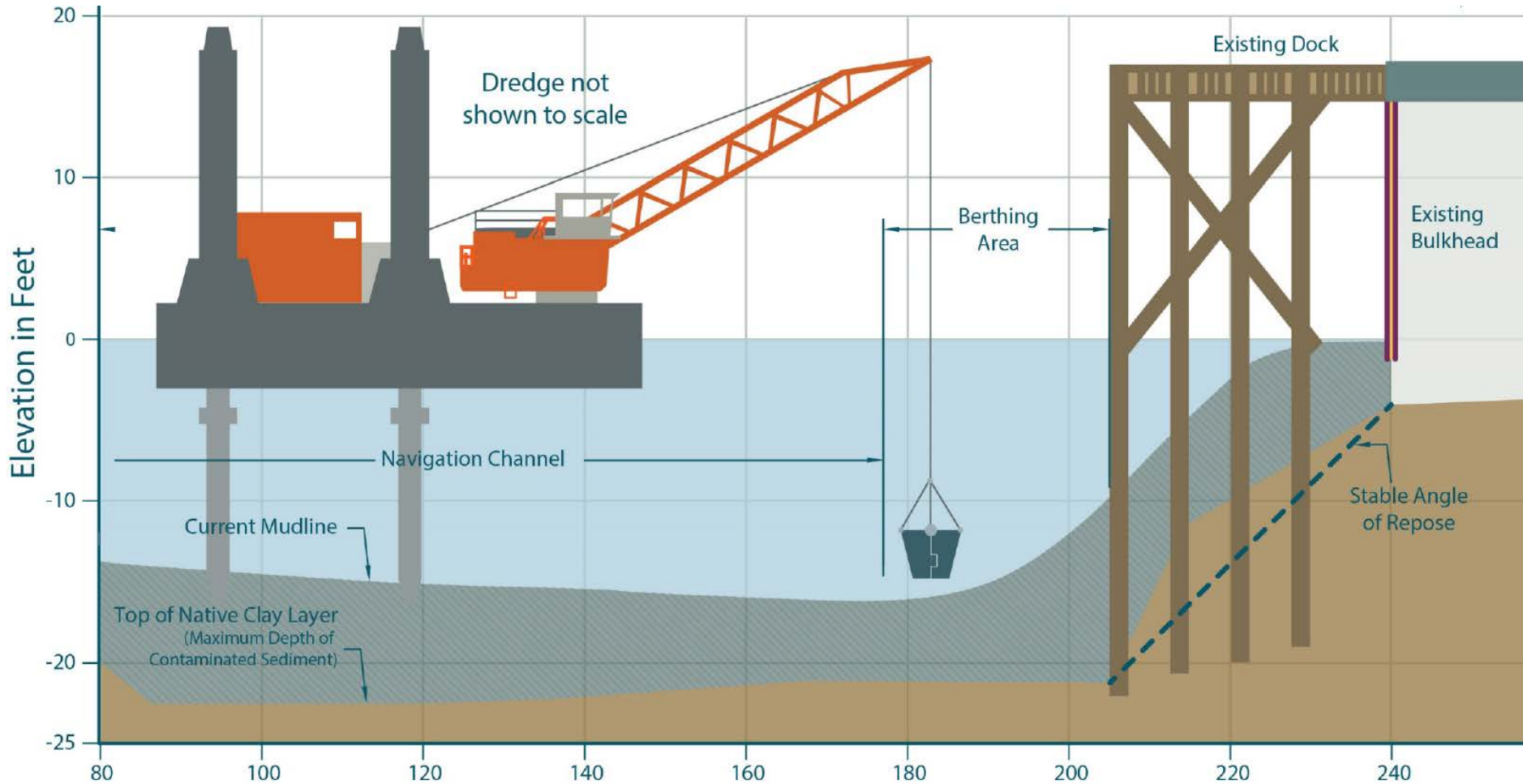
Plan



How Close is Too Close (Triggering Review)

Federal Guidance: *Districts may elect to establish setbacks to delineate the minimum distances a structure or feature should be located from a navigation feature to avoid impacting the usefulness of the project.*

Dock Replacement Example





In-River Sediment Disposal

- Routine O&M dredging projects
 - Material placement outside federal channel
 - May trigger Section 408 review unless lack of impact previously established and documented
- Columbia River example (in development)
 - Renewal of 20 year O&M program
 - USACE and sponsor ports working together
 - Pre-approval of clean dredge material placement locations
 - Limit need for separate 408 reviews

Your recent experiences?

4. Joint Decisions

- One decision for 408 review and USACE Regulatory
 - Joint approval: If 408 and regulatory projects exactly the same
 - Example: channel maintenance dredging by non-federal party
 - › Combined 10/408 permit
 - Separate approvals: If 408 and regulatory projects are different
 - Example: Channel maintenance dredging by non-federal party and separate wetland fill component
 - › Section 10/Section 404 permit issued for dredging and wetland fill
 - › 408 permission issued for work in navigation channel
- Combined 404/10/408 projects
 - Internal leads for USACE review
 - Likely signed by District Commander

5. Review Timeframes

- 30 days to determine application completeness
- 90 days after complete application:
 - Make decision on application, or
 - Provide schedule for application decision
- Extensions over 120 days require notification from HQ to:
 - US Senate Committee on Environment and Public Works
 - US House Committee on Transportation and Infrastructure
- Section 106 (cultural resources) and Section 7 (endangered species) often > 90 days

6. Multi-Phase Review

- Option for multi-phased reviews
- Multi-year, programmatic projects
 - Watershed based master plans
 - Multi-phase levee setback project
- Interim reviews conducted
 - As level of detail is progressively developed
- Interim approval milestones
 - Written USACE responses identifying no critical issues precluding eventual approval of 408

7. 60% Design Requirement

- Elimination of 60% minimum design for 408 decisions
- 60% design may be required for larger projects that require a Safety Assurance Review
 - Large levee relocation projects protecting major infrastructure



8. Tracking Database

- 408 tracking database
 - Maintained by HQ
 - Populated by districts and divisions
 - Subset of information made available to the public regarding
 - Status of 408 requests
 - Previously issued 408 decisions



EC 1165-2-220 – USACE Contacts

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- Each district developing own implementation guidance
- Planning training session for Ports in near future

Questions/Discussion

