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April 6, 2018

Headquarters, U.S. Army Corps of Engineers
Attn: CECW-CE/3E62 (Ms. Tammy Conforti)
441 G Street NW
Washington, D.C. 20314-1000

Re: Comments on Policy and Procedural Guidance for Processing Requests to Alter U.S. Army Corps of Engineers Civil Works Projects Pursuant to Section 408, 83 Fed. Reg. 5075 (Feb. 5, 2018); Docket ID No. COE-2018-0003

Dear Ms. Conforti,

The American Gas Association (“AGA”) and the Interstate Natural Gas Association of America (“INGAA”) respectfully submit these comments in response to the United States Army Corps of Engineers’ (the “Corps”) public notice announcing the availability of draft Engineer Circular 1165–2–220 (“Draft EC”), which would provide the policies and procedures for how the Corps processes requests to alter a Corps civil works project pursuant to Section 14 of the Rivers and Harbors Act of 1899 (“RHA”) (Title 33, Section 408 of the U.S. Code). *See* 83 Fed. Reg. 5075 (Feb. 5, 2018). The proposed circular would replace the current Corps policy¹ and will expire two years from issuance. After two years, the proposed EC will be revised, rescinded, or converted into an Engineer Regulation. 83 Fed. Reg. at 5075, col. 3.

AGA, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 74 million residential, commercial and industrial natural gas customers in the United States, of which 95 percent — more than 70 million customers — receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas

¹ 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 USC 408* (July 31, 2014).

companies and industry associates. Today, natural gas meets more than one-fourth of the United States' energy needs.

INGAA is a non-profit trade association whose member companies transport over 95 percent of the nation's natural gas through a network of 200,000 miles of pipelines. Ensuring the safety, security, and reliability of this natural gas pipeline network is crucial to meeting the energy needs of the United States and contributes directly to the United States economy by powering domestic industry and providing jobs. The siting, construction, and operation of interstate natural gas pipelines is regulated by the Federal Energy Regulatory Commission ("FERC") under the Natural Gas Act, 15 U.S.C. §§ 717, *et seq.*

AGA and INGAA members regularly must obtain Clean Water Act ("CWA") Section 404² permits and RHA Section 408³ authorizations when natural gas pipeline projects cross Corps public works projects (e.g., levees, dams, bridges, and dredged channels). As a result of non-prescriptive Corps guidance documents confusing implementation in the various Corps Districts, this process can often be lengthy and costly and has frequently led to miscommunication and unnecessary delays in permitting.

Therefore, we support the Corps' renewed efforts to clarify the Section 408 permission process, and to establish standard operating procedures to streamline Section 408 approvals. Our members have gained substantial experience with the Section 408 program, and they appreciate the Corps' efforts to improve the program's effectiveness and efficiency so that pipeline infrastructure is not needlessly delayed or restricted. In addition, the adoption of the recommendations included herein, will support the Trump Administration's goals of expediting approvals for infrastructure projects.⁴ To that end, we provide the following comments.

A. Clarify that Categorical Permissions May Apply to Natural Gas Pipelines

We support the general implementation of categorical permissions to streamline the Section 408 approval process; however, the proposed circular does not identify any categories of alterations that could rely on categorical permissions. Instead, the Draft EC leaves it to the Corps Districts, Divisions, and Headquarters to establish categorical permissions. *See* Draft EC at C-1. To ensure that categorical permissions will be established for natural gas pipelines, Corps Headquarters should either clarify in the final EC that categorical permissions for natural gas pipelines may be established by the Districts, or establish a nationwide categorical permission for linear projects, such as natural gas pipelines. Similar to Nationwide Permit 12, which authorizes the discharge of dredged or fill material associated with certain utility line activities within streams and wetlands, Corps Headquarters could develop and implement a

² 33 U.S.C. § 1344.

³ Where activities affect Corps civil works projects, the Corps may grant permission to private entities for the permanent or temporary alteration or use of Corps civil works projects as long as the alteration "will not be injurious to the public interest and will not impair the usefulness of such work." 33 U.S.C. § 408(a).

⁴ *See* Exec. Order No. 13,766 (Jan. 24, 2017), Exec. Order No. 13,783 (Mar. 28, 2017), and Exec. Order No. 13,807 (Aug. 15, 2017).

nationwide categorical permission for linear activities, like natural gas pipelines, that satisfies the Section 408 requirements.

The EC proposes to streamline approval for “categories” of alterations that are similar in nature, do not impair the usefulness of Corps civil works projects, and have less than significant environmental impacts. Similar to general permits under the Corps’ Section 404 program, the analysis of effects, pursuant to the National Environmental Policy Act (“NEPA”), and other environmental compliance for the identified activities is completed during the establishment of the categorical permission. Then, the Corps reviews individual Section 408 requests for compliance with the established categorical permission. For those requests that are consistent with the terms and conditions of a categorical permission, the Section 408 permission can be granted with an abbreviated validation process that includes standard mitigation measures and best management practices.

The Sacramento District recently proposed⁵ to implement a categorical permission for a number of potential alterations that are similar in nature and have similar impacts, including the installation or modification of pressurized and non-pressurized pipes.⁶ This proposed categorical permission, however, excludes “requests for new, long distance pipelines crossing multiple [Corps] navigation and flood risk reduction projects or crossing a single project in multiple locations.”⁷ We are concerned that other Corps Districts may pursue a similar approach. Therefore, AGA and INGAA recommend that Corps Headquarters clarify in the final EC that categorical permissions for long distance natural gas pipelines may be created by the Districts, and establish a nationwide categorical permission for natural gas pipelines.

B. Clarify that the Corps May Issue RHA Section 10 and Section 408 Approvals as a Single Authorization for Natural Gas Pipelines

AGA and INGAA recommend that the Corps clarify that, similar to electric transmission lines, the Corps’ scope of analysis under RHA Section 10⁸ and Section 408 will typically align for natural gas pipeline projects. The Draft EC suggests that activities in, over, or under, navigable waters within a Corps civil works project typically require authorization under both RHA Section 10 and Section 408. The Corps’ scope of analysis under each authority, however, may be different; the scope of analysis under Section 10 is generally limited to jurisdictional waters, whereas the scope of analysis for Section 408 is defined by the limits of the civil works project. Where the scope of analysis for the activity completely aligns, the Draft EC indicates that a single authorization will be issued and no separate Section 408 decision is required. Under this expedited approach, Corps civil works staff will evaluate impacts to the usefulness of the civil works project and provide regulatory staff with a formal memorandum documenting their findings. Appendix G to the proposed EC identifies a number of activities in which it may be

⁵ See Corps, Sacramento District, Public Notice, Categorical Permission for Section 408 Requests (Sept. 18, 2017).

⁶ *Id.* at 3-4.

⁷ *Id.* at 4.

⁸ 33 U.S.C. § 403.

likely that the jurisdiction and scope would be the same for both the Section 10 and Section 408 authorizations, including proposals for electric transmission lines. Draft EC at G-3.

Because natural gas pipelines are not included on this list, we encourage the Corps to clarify that, similar to electric transmission lines, natural gas pipelines will also typically fall within this category. Typically, the scope of jurisdiction under Section 10 and Section 408 will align when the proposed activities would affect Corps navigation projects, such as channels or harbors. Natural gas pipelines, like electric transmission lines, are linear projects that would have minimal impacts on the usefulness of a navigation project.

C. Maintain Stringent Deadlines to Encourage Timely Reviews

Due to our members facing significant delays associated with the Section 408 permission process, we support implementation of Section 1156 of the 2016 Water Resources Development Act (“WRDA”) and the inclusion of stringent deadlines in the final EC. The Draft EC emphasizes the importance of timely reviews and responsiveness to requesters, and proposes specific deadlines, consistent with WRDA 2016 Section 1156. Within 30 days, the Corps must determine whether the request is complete and/or whether the proposed alteration qualifies for a categorical permission. Within 90 days of the completeness determination, the Corps must review and provide a decision. Written notification is required if the Corps cannot meet the 90 day timeline. If the schedule extends beyond 120 days, the District must send a memorandum to the Director of Civil Works with a justification explaining why a decision could not be made within 120 days. Such delays must also be reported to Congress.

The vast majority of pipeline projects requiring Section 408 approval will also require authorization pursuant to RHA Section 10 or CWA Section 404, but the Corps will not issue a Section 10 or Section 404 permit until a determination has been made regarding the Section 408 request. Therefore, adherence to these timelines is also critical to efficiently processing regulatory permits. To facilitate compliance with these deadlines, the level of technical analysis required for the Section 408 review (e.g., engineering, geotechnical) should be proportional and commensurate with standard industry studies for the project type and the potential impacts of the project. Also, it is important for Section 408 personnel to be involved in early project discussions to help identify the location of civil works projects, avoid potential impacts, and establish close coordination with regulatory staff.

Our members have also expressed concerns about obtaining a “Statement of No Objection” from a non-federal sponsor before Section 408 approval can be granted. The Draft EC indicates that, unless the alteration would be *integral* to the functioning of the civil works project, a Statement of No Objection is not required when the project proponent has acquired eminent domain authority. *See* Draft EC at 11. Some non-federal sponsors improperly interpret the alteration as integral to the civil works project, and use the Statement of No Objection requirement to impose unreasonably high standards on requesters, significantly delaying pipeline projects. The eminent domain power is critical to the success of many pipeline projects and, therefore, we encourage the Corps to use the authority provided by Project Partnership Agreements with non-federal sponsors to hold them accountable when they make unreasonable

requests from project proponents or inappropriately deem an alteration integral to a civil works project.

In reviewing proposed alterations, the Corps states that “[i]f at any time it is concluded that the usefulness of the authorized [Corps] project will be negatively impacted, any further evaluation should be terminated and the requester notified.” Draft EC at 14. We find this statement to be unreasonable. We recommend that the Corps amend this statement to encourage Districts to work with the requester to see if alternatives could be developed to avoid the negative impacts before the District terminates the evaluation.

D. Clarify the Incentives for Entering Section 214 Funding Agreements

To encourage more natural gas companies to participate in Section 214 funding agreements, we recommend that the Corps clarify the incentives for participation. Pursuant to Section 214 of the 2000 WRDA, the Corps may accept funds contributed by a natural gas company to expedite the evaluation of any Corps permit, including Section 408 permissions. 33 U.S.C. § 2352(a)(2). The Draft EC indicates that expediting the review process could include “generally shorter review times” and the “facilitation of a smoother review process.” Draft EC at I-5. In light of the new deadlines discussed above, it’s unclear to what extent the Corps will hasten the review process. Therefore, we suggest that the Corps clearly communicate to applicants in the final EC or at the District level the difference in the review timeline for project reviews that are funded by the applicant.

E. Streamline NEPA Compliance

While we recognize that both civil works and regulatory personnel must comply with NEPA, in the context of permitting interstate natural gas pipelines, these processes should adopt or incorporate by reference FERC’s environmental impact statement (“EIS”) or Environmental Assessment (“EA”) for the Section 408 permission. Thus, we support the Corps statements in the proposed EC that strongly encourage the adoption of any NEPA documentation that may already exist for the federal project. *See* Draft EC at D-6. The proposed EC appropriately states that supplemental NEPA documentation should only cover those environmental impacts associated with the Section 408 request. *Id.* In addition, to oversee this process and facilitate cooperation between Corps regulatory and civil works personnel and FERC, we recommend that the Corps designate an agency lead to coordinate with FERC and shepherd the project through the multiple authorizations.

In addition to our support for the Corps’ adoption or incorporation of other NEPA documents, we also strongly support a number of statements in the proposed EC that properly clarify applicable NEPA requirements. First, the Corps properly defines the narrow scope of environmental analysis for pipeline projects. “[I]f a proposed alteration is part of a larger project that extends beyond the [Corps] project boundaries, the district should focus its analysis for environmental compliance on only those portions or features of the larger project that [the Corps] has sufficient federal control and responsibility to review.” Draft EC at D-5. For example, “the scope of analysis for Section 408 review would be limited to the effects of the pipeline or highway within the [Corps] project boundary, but would not address those portions of the pipeline or highway beyond the [Corps] project boundary.” *Id.* Similarly, the proposed EC

states that reasonable alternatives are appropriately limited to two scenarios: (i) the no action alternative and (ii) the proposed action. *Id.* Furthermore, where an EA is prepared or a categorical exclusion applies, the draft NEPA documents “should generally not be circulated for public comment.” *Id.* Instead, a public notice soliciting input will serve as the method of involving the public in the NEPA process. These important clarifications will help ensure that the Corps complies with NEPA requirements and will hopefully result in a more efficient environmental review process.

Within the section addressing requirements for a complete Section 408 request, the proposed EC states “[a] Section 408 request is not considered complete until a *final* NEPA document (e.g., documentation of applicability of a categorical exclusion, EA, or FEIS) has been drafted.” Draft EC at 13 (emphasis added). AGA and INGAA have some concerns about this statement. If the Corps requires a final NEPA document before processing the Section 408 request, it would significantly delay the overall permitting process for a project because NEPA documents generally do not become final until the conclusion, or towards the end, of the permitting process. This requirement appears to be unreasonable and the Corps should amend this statement in the final EC.

F. Clarify Who Manages the Review Process When a Project Crosses Multiple Districts

The proposed EC fails to clarify who is in charge when a project, such as a pipeline, crosses more than one Corps District. The majority of Section 408 requests are decided at the District level, but, in addition to the District Coordinator, the Draft EC specifies a regional Division Coordinator, in the event higher level coordination is needed. According to the proposed EC, the Division Coordinator “will ensure proper coordination among other districts if the [Corps] project or proposed alteration crosses more than one district’s area of responsibility.” Draft EC at 2. But the proposed EC also states that for requests that cross more than one district, “the division, in coordination with the districts, will designate a lead district.” Draft EC at 4. Based on these statements it’s unclear who is in charge – the Division Coordinator or the Lead District? This inconsistency could potentially lead to more confusion rather than more efficiency. Because AGA and INGAA’s members often propose pipeline projects that traverse multiple Corps Districts, we recommend that the Corps clarify which Corps official would be responsible for managing the Section 408 review process.

G. Establish Tools to Track Project Status in the Proposed Public Database

According to the proposed EC, the Corps is developing a database to track all Section 408 requests, which should be available upon release of the final EC. A subset of the database will be made publicly available, including fields relating to the status of an individual request. We support the development of a database to track the status of requests and recommend that this system also be used to improve communication with the requester. For example, the database should confirm receipt of submitted application materials; confirm that materials for each component of the request (e.g., NEPA, National Historic Preservation Act Section 106, etc.) are complete; confirm that completed materials have been assigned to a reviewer; confirm the timeline for the reviewer to complete review of that component of the application; confirm that

review of each component is complete and no additional information is needed; and where coordination with regulatory staff is required (e.g., Section 404 permit, Section 10 permit, etc.) confirm coordination is taking place. By creating these additional checkpoints in the database, the Corps can ensure that its staff is efficiently communicating and coordinating with the requester throughout the entire review process.

In addition, we support the creation of a national database to identify Corps civil works projects that are subject to Section 408 approval, especially those projects with a non-federal sponsor. Often Corps civil works projects were constructed years, decades, or even a century ago, and for this reason, the Section 408 status of the projects, particularly those with a non-federal sponsor, is often unclear. The records associated with the civil works project may not be readily available, and we are not aware of an existing, national database that can be used to obtain reliable information about civil works projects for applicants in their project planning. For these reasons, identification of civil works projects, as well as consideration of alternatives to avoid and/or minimize impacts to those projects, is often difficult and may sometimes lead to project delays (e.g., if a civil works project requiring Section 408 approval is identified late in the project planning process). Thus, the Corps should develop a comprehensive, national database that includes the geographic and sponsor information of each civil works project subject to Section 408 approval, and that database should be made available to the public so it can be used for desktop identification during project planning.

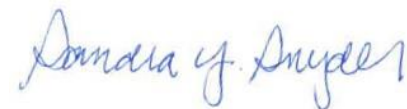
Conclusion

AGA and INGAA appreciate your consideration of these comments and we welcome additional dialogue. Please contact Pam Lacey at 202-824-7340; placey@aga.org or Sandra Snyder at 202-202-216-5955; ssnyder@ingaa.org if you have any questions. Thank you.

Sincerely,



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