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SUBJECT: Policy and Procedural Guidance for the Approval of Modification and Alteration of Corps of Engineer Projects

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DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
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WASHINGTON, D.C. 20314-1000

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OCT 23 2006

MEMORANDUM FOR MAJOR SUBORDINATE COMMANDS

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1. REFERENCES:

- a. ER 1165-2-119, dated 20 September 1982, Modifications to Completed Projects
- b. 33 CFR 208.10, Local flood protection works; maintenance and operation of structures and facilities
- c. 33 USC 408, Taking possession of, use of, or injury to harbor and river improvements
- d. 33 CFR 320.4, General policies for evaluating permit applications
- e. Section 404 of the Clean Water Act
- f. Section 10 of the River and Harbors Act of 1899

2. PURPOSE. Recent events have demonstrated the need to provide clarification and additional guidance on the policy and procedures for dealing with proposals to modify or alter completed Corps of Engineers projects that are either locally or federally maintained. Often requests for modifications to Corps projects come up in the context of Section 404 permitting actions or for modifications to existing Corps projects for the purposes of O&M. This memorandum addresses the use of the appropriate authority and the proper level of approval for such proposals.

3. BACKGROUND.

a. ER 1165-2-119 provides policy and guidance on the modification of completed Corps of Engineers projects, and describes the specific circumstances under which modifications can be approved and accomplished. In general, proposed significant modification of a completed project, involving new Federal construction or real estate acquisition, and any proposed modification that would make the project serve new purposes, or increase the scope of services to authorized purposes beyond that intended at the time of construction, or to extend services to new beneficiaries (areas), requires authorization by Congress. There may be instances where reporting officers find that proposed significant changes to a completed project may be desirable, in which case investigations may be undertaken to document the need for and the feasibility of such project modifications. To the extent practicable, such changes should be accomplished under existing authorities. However, the circumstances under which such modifications can be approved and made are limited, as discussed in the ER, and are briefly summarized below.

b. For projects constructed, operated and maintained by the Corps, the Corps may, as part of its operations and maintenance efforts, make reasonable changes and additions needed to

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properly operate the project or minimize maintenance. In addition, multiple purpose projects operated and maintained by the Corps may be modified within existing authorities for dam safety assurance, changes in water control plans, addition of water supply, changes to meet water quality needs, and recreation and fish and wildlife enhancement, as discussed in the ER. The Chief of Engineers also has limited discretion to modify navigation projects. For Corps-constructed projects operated and maintained by local interests, any proposed Federal work at these projects usually requires congressional authorization, with the exception of work required to correct a design deficiency.

c. Guidance on the responsibilities for the operation and maintenance of local protection projects is found in 33 CFR 208.10. This regulation describes local sponsors' responsibilities for operating and maintaining the structural soundness and functionality of the project in order to assure that the project meets its authorized purposes. Specifically, 33 CFR 208.10 a (5) requires that "no improvement shall be passed over, under, or through the walls, levees, improved channels or floodways, nor shall any excavation or construction be permitted within the limits of the project right-of-way, nor shall any change be made in any feature of the works without prior determination by the District Engineer" that such changes will not adversely affect the functioning of the protective facilities. The types of changes that can be considered and approved by a District Engineer under 33 CFR 208.10 are relatively minor, low impact modifications, such as pipes or pipelines proposed to pass over or through a Federal work, or a road or similar type of infrastructure improvement proposed to pass over a Federal levee. Such minor proposed modifications are considered part of a District Engineer's responsibilities related to normal O&M of such facilities. Any proposed modification of a Federal work, such as a levee or channel, which would involve significant changes to the authorized project's scope, project purpose, or functioning, cannot be approved by the District Engineer, but instead must be forwarded through the Division Commander for the approval of the Chief of Engineers, as explained hereinafter. That is, any proposed change to a Federal work exceeding the level of ordinary District O&M responsibilities for a project must be sent through the Division Commander to the Chief of Engineers for approval, as discussed in the following paragraphs.

d. Any proposed modification to an existing Corps projects (either federally or locally maintained) that go beyond those modifications required for normal O&M require approval under 33 USC 408. 33 USC 408 states that there shall be no temporary or permanent alteration, occupation or use of any public works including but not limited to levees, sea walls, bulkheads, jetties and dikes for any purpose without the permission of the Secretary of the Army. Under the terms of 33 USC 408, any proposed modification requires a determination by the Secretary that such proposed alteration or permanent occupation or use of a Federal project is not injurious to the public interest and will not impair the usefulness of such work. The authority to make this determination and to approve modifications to Federal works under 33 USC 408 has been delegated to the Chief of Engineers.

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4. POLICY.

Any significant alteration or modification to either a locally or federally maintained Corps of Engineers project must be approved by the Chief of Engineers under 33 USC 408 unless covered by ER 1165-2-119. Modifications to a Corps projects beyond those necessary to properly operate the project or to minimize maintenance costs as well as any significant alteration or modification requested by any non-Federal interest for their own benefit also requires the Chief's approval under 33 USC 408.

5. PROCEDURES.

a. The following information will be provided with any request for the approval of significant modifications or alterations to a locally or federally maintained Corps project requiring the Chief of Engineers approval under 33 USC 408.

1. A written request by the non-Federal interests for approval of the project modification/alteration.
2. A physical and functional description of the existing project
3. A detailed description of the proposed modification
4. The purpose/need for the modification
5. A description of any related, ongoing Corps studies/efforts in the watershed
6. A Public Interest Determination
7. Appropriate NEPA documentation
8. Any Administrative Record
9. A discussion of indirect effects
10. A discussion of E.O. 11988 Considerations
11. Technical Analysis
 - Technical adequacy of the design
 - Changes in water surface profiles and flow distribution
 - Assessment of anticipated local and system-wide resultant impacts, i.e., impacts on system integrity
 - Upstream and downstream impacts of the proposed alterations, including potential impacts to existing floodplain management and water control management plans of Federal projects within the basin
 - A discussion of residual risk

b. If there is an associated Section 404/10 permit action, the required public interest and technical evaluations under 33 USC 408 can be done concurrently with that action. Upon completion of the public interest determination and of the technical analyses regarding the impact of the proposed modification on the usefulness of the project, the District Engineer will make a recommendation (with supporting documentation) through the Division Commander to

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the Chief of Engineers (Attn: Appropriate RIT) for his consideration and approval under 33 USC 408. The District Engineer will make the final Section 404/10 permit decisions following the Chief of Engineers decision under 33 USC 408. A minimum of 30 days must be allowed for HQUSACE review.

c. For locally operated and maintained Corps projects, the operations and maintenance for any approved project modifications or alterations will be the responsibility of the non-Federal sponsor and the Project Cooperation Agreement or other appropriate document must be updated to address non-Federal sponsor responsibilities for the approved modifications.

6. If the desired modifications cannot be suitably pursued or approved under any of the preceding approaches, additional congressional authorization may be required. Section 216 of the Flood Control Act of 1970 is the appropriate authority to use to consider such modifications.

7. Consideration will be given to further delegation of the approval authority to a lower level as we gain more experience with the types of changes that are proposed for approval under 33 USC 408.

FOR THE COMMANDER:


for DON T. RILEY
Major General, USA
Director of Civil Works