

MEMORANDUM FOR RECORD

SUBJECT: Section 408 Emergency Permission

Procedures

1. Reference:

- a. Engineering Circular (EC) 1165-2-220 Policy and Procedural Guidance for Processing Requests to Alter US Army Corps of Engineers Civil Works Projects Pursuant to 33 USC 408.
- b. 33 USC 2349 sec 1005(b) (WRDA 2014) Categorical Exclusions in Emergencies
- c. 33 CFR 230.8 NEPA – Emergency Actions
- d. 36 CFR 800.3 NHPA – Initiation of the Section 106 Process
- e. 36 CFR 800.4 NHPA – Identification of Historic Properties
- f. 36 CFR 800.5 NHPA – Assessment of Adverse Effects
- g. 36 CFR 800.6 NHPA – Resolution of Adverse Effects
- h. 36 CFR 800.12 NHPA – Emergency Situations
- i. 50 CFR 402.05 Endangered Species Act – Emergencies and Chapter 8 of the ESA Section 7 Consultation Handbook (1998)

2. Purpose: This memorandum documents requirements and criteria for Emergency Section 408 Permissions as defined by EC 1165-2-220 (ref. a), WRDA 2014 Section 1005(b) (ref. b), and 36 CFR 800.12 (ref. h).

3. Background: In order for the Los Angeles District (USACE-SPL) to approve any proposed alteration request to our civil works flood control projects it must meet applicable standards and not be injurious to the public interest or affect the project's ability to meet its authorized purpose. The following typical reviews are required prior to making a decision for an alteration request.

- a. Technical Compliance (Civil Design, Hydrology & Hydraulics, Geotech, Geology, Structural, Reservoir Regulation, Dam & Levee Safety, Operations, Construction), as appropriate.
- b. NEPA Compliance (Cultural Resources Report, National Historic Preservation Act, Endangered Species Act, Biological Opinion, Executive Orders, etc.).
- c. Real Estate Compliance (Easement, Title Report & Deed) to evaluate the proposed alteration.
- d. Other USACE Policy Compliance. The proposal will be evaluated for impacts to flood conveyance, reservoir structural integrity, reservoir capacity, and flood fighting capabilities as well as meeting Corps policy and criteria.
- e. Operation & Maintenance Compliance. The Requester will be responsible for the operation and maintenance of the proposed alteration. The Requester must identify any operations and maintenance requirements needed throughout the life of the proposed alteration and the responsible entity for the operations and maintenance into the future.

#### 4. Conditions for Emergency Permission

Per EC 1165-2-220, if a proposed emergency situation alteration request requires a Section 408 permission, the District can reprioritize and expedite reviews as appropriate to give the urgency required for each specific situation. Refer to Appendix D of EC 1165-2-200 on expediting environmental compliance in emergency situations. The District has discretion to use emergency procedures to process Section 408 requests when reviewing for Technical, Real Estate, Policy, and NEPA compliance.

For Historic and Cultural Resources compliance, EC 1165-2-220, Appendix D states that if a district does not establish standard procedures to follow during a disaster and/or emergency or does not have a programmatic agreement with emergency preservation procedures in consultation with the Advisory Council on Historic Preservation and others, then the district shall follow the procedure as specified in 36 CFR 800.12(b)(2). Since SPL does not have any standard procedures established in consultation with the Advisory Council on Historic Preservation and others, SPL must follow the procedure as specified in 36 CFR 800.12(b)(2), included herein as Attachment 2.

#### 5. Emergency Procedures for USACE-SPL 408 Permission Requests

- a. Determine if an emergency exists or potentially exists

(1) Requester shall fill out the Permit Inquiries Checklist and email the check list to: [SPLPermitInquiries@usace.army.mil](mailto:SPLPermitInquiries@usace.army.mil)

Visit <https://www.spl.usace.army.mil/Missions/Permitting/> for additional information. Mention it is an emergency request in the Permit Inquiries Checklist. The email subject line should contain the project name or location and emergency request.

- (2) Requester will be notified by email if a Section 408 Permission is needed, and if Regulatory Permits are needed. The 408 Coordinator and Regulatory Division would attempt to respond within 1 to 2 business days, if practical. If a Section 408 Permission is required, work should not be started until the submittals listed below have been provided.
- (3) Per EC 1165-2-220, neither the District Commander, the Section 408 Decision Maker, nor the Section 408 Coordinator may declare an emergency on behalf of a requester for a Section 408 Permission request.
- (4) A declaration of emergency written by the President, a tribal government, the Governor of a State, local government's chief executive officer or legislative body. (Refer to Attachment 1 for an example).
- (5) **Without a proper emergency declaration, an emergency Section 408 permission cannot be processed.**

b. Processing an Emergency Section 408 Permission.

- (1) If a Section 408 Permission is required, the following documents will be required prior to issuance of a 408 permission:
  - (a) A declaration of emergency
  - (b) If the alteration request is within the operation and maintenance responsibilities of local (non-Federal) sponsor, then the Requester will be the local (non-Federal) sponsor, and the local (non-Federal) sponsor shall submit a signed application form and a no objection letter on behalf of the 3<sup>rd</sup> party applicant. If the alteration request is within SPL operation & maintenance boundaries, the 3<sup>rd</sup> party applicant will submit the signed application directly to SPL, however a No Objection letter will be required from local (non-Federal) sponsor.
  - (c) Requester shall submit adequate information to develop an emergency permission package. Such information may include conceptual plans, calculations, environmental, or any other document to make a risk-based decision for the Section 408 permission.

- (d) Requester shall submit any existing environmental documents related to proposed alteration. Such documentation may include cultural resource report, biological resources report or pre-construction surveys, environmental assessment, CEQA documents, if available.
- (e) A letter from the Requester to confirm that an archaeological monitor will be present onsite during ground disturbing activities. A monitoring report shall be submitted upon construction completion.
- (f) A letter from the Requester to confirm that a pre-construction biological survey shall be conducted by a qualified biologist, and a biological monitor shall be present onsite during construction, if there is a potential for federally listed as threatened or endangered species or their habitat to occur in the vicinity of the emergency activities. A monitoring report shall be submitted upon construction completion.
- (g) Requester shall submit any easement, title report, and real estate agreement, if available.

Based on the above submitted items, the Agency Official (408 Decision Maker) determines if the Section 408 Request addresses a response to an immediate threat to life and property and decides to use emergency procedures per EC 1165-2-220.

- (2) The Agency Official (SPL 408 Decision Maker) shall notify the Council, the SHPO/THPO, and Indian tribes, allowing 7 days to provide comment.
- (3) If no responses from Council (ACHP), the SHPO/THPO, or Indian tribes, then USACE will consider Section 106 compliance complete for the emergency Section 408 Request; however, regular Section 106 compliance needs to be conducted following the eventual receipt of a full cultural resources report.

c. Post construction documentation

- (1) Within 120 days from completion of the emergency activities, the following documents are required:
  - (a) Requester shall submit post construction as-builts plans.
  - (b) Requester shall prepare and submit a complete cultural resources report documenting the effects of the action on potential historic properties and coordination with tribes utilizing the approved template.

- (c) Requester shall prepare and submit a complete biological resources report documenting the effects of the action on federally listed as threatened or endangered species.
- (d) For activities that do not meet the 33 USC 2349 Sec 1005(b) (WRDA 2014) Categorical Exclusions in Emergencies, the Requester shall prepare a draft Environmental Assessment utilizing the approved template.

If the Requester cannot meet the timeline for document submittals, an extension may be requested. If the Permittee does not submit the documentation in a timely manner, the emergency 408 permission will be revoked.

6. Other regulations. Other relevant regulations related to emergency situations include the following: (i) 50 CFR 402.05 – Interagency Cooperation - Endangered Species Act of 1973, Emergencies, included herein as Attachment 3, (ii) 33 CFR 230.8 – Corps of Engineers, Department of the Army, Department of Defense, Procedures for Implementing NEPA, Emergency actions, included herein as Attachment 4, and (iii) 33 USC 2349 sec 1005(b), included herein as Attachment 5.

Guidance to address emergency situations where permits are required from USACE under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899, including those associated with work stoppages as a result of alleged violations of Section 404 and/or Section 10, can be found under 33 CFR 325.2(e)(4).

7. Other considerations. Per EC 1165-2-220, Emergency alterations or emergency activities performed by USACE-on-USACE projects under Public Law (PL) 84-99, do not require Section 408 permission. Alterations by others that are considered an emergency and/or urgent, which may include interim risk reduction measures, but not implemented under PL 84-99, may require Section 408 permission and EC 1165-2-220 would apply. Districts will consider if the alteration meets other criteria defined under this paragraph 9 of EC 1165-2-220. If this EC applies, districts can reprioritize and expedite reviews as appropriate given the urgency required for each specific situation. Reference Appendix D of EC 1165-2-220 on expediting environmental compliance in emergency situations.

Per EC 1165-2-220, Activities to restore the USACE project to the physical dimensions and design of the constructed project, without any changes to the real property, existing design features, or physical dimensions or performance of the USACE project do not require Section 408 permission.

8. The point of contact for 408 Permission Requests is Mr. Rafi Talukder, who can be reached at 213-452-3745 or at [spl.408permits@usace.army.mil](mailto:spl.408permits@usace.army.mil).

Pamela J. Lovasz, P.E., P.G.  
Chief, Engineering Division  
Los Angeles District

**ATTACHMENT 1**

**EXAMPLE EMERGENCY DECLARATION**



DEPARTMENT OF FORESTRY AND FIRE PROTECTION  
OFFICE OF THE STATE FIRE MARSHAL

P.O. Box 944246  
SACRAMENTO, CA 94244-2460  
(916) 568-3800  
Website: [www.fire.ca.gov](http://www.fire.ca.gov)



December 24, 2022

Rafi Talukdar  
915 Wilshire Blvd.  
Los Angeles, CA 90017

Subject: Emergency Situation, Requested Approval of Section 408 Permit for Kinder Morgan

On December 24, 2022, an emergency exists at the San Gabriel River, in the cities of Bellflower and Cerritos of Los Angeles County. A pipeline failure has occurred which is threatening critical infrastructure and state commerce due to interruption of the petroleum fuel supply chain supporting California National Guard, California international airports, and the people of California.

The Office of the State Fire Marshal, Pipeline Safety Division, is declaring that an emergency situation exists, and that expedited permit approvals for a section 408 US Army Corps of Engineers be granted for Kinder Morgan (KM) to perform excavations of their existing pipeline and right away next to the San Gabriel River.

Currently, Kinder Morgan's pipeline is shut down and purged for safety of the environment and public. If not repaired within five (5) days from the date of this letter, the emergency will have impacts to California's safety. This line supplies fuels to emergency services such as law enforcement, fire, and medical, which would have negative impacts to the welfare of the public. Additionally, it serves as the main conduit for fuels for the United States Armed Services. This pipeline also supports two (2) international airports and extended downtime will cause disruptions to commercial air travel services.

Please contact me with concerns at (562) 302-2524.

Respectfully,

Jim Hosler  
Assistant Deputy Director, Pipeline Safety Division  
CAL FIRE, Office of the State Fire Marshal

cc: Wendy Collins, Assistant State Fire Marshal, CAL FIRE - OSFM  
Pam Lovasz, Chief, Engineering Division, US Army Corps of Engineers  
Michael Massone, Assistant Director Response Operations, Cal OES  
Dustin Hubbard, Director, Western Region, PHMSA  
Danielle Stevens, Compliance Manager, Kinder Morgan

*"The Department of Forestry and Fire Protection serves and safeguards the people and protects the property and resources of California."*



**ATTACHMENT 2**

**EMERGENCY PROCEDURES PER 36 CFR 800.12(b)(2)  
SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT**

## 36 CFR 800.12 Emergency Situations

Council refers to the Advisory Council on Historic Preservation (ACHP), a Council member, or employee designated to act for the Council.

***(b) Alternatives to agency procedures.***

*In the event an agency official (USACE-SPL) proposes an emergency undertaking (Section 408) as an essential and immediate response to a disaster or emergency declared by the President, a tribal government, or the Governor of a State or another immediate threat to life or property, and the agency has not developed procedures pursuant to paragraph (a) of this section, the agency official may comply with section 106 by:*

*(1) Following a programmatic agreement developed pursuant to § 800.14(b) that contains specific provisions for dealing with historic properties in emergency situations. or*

*(2) Notifying the Council, the appropriate SHPO/THPO and any Indian tribe or Native Hawaiian organization that may attach religious and cultural significance to historic properties likely to be affected prior to the undertaking and affording them an opportunity to comment within seven days of notification. If the agency official determines that circumstances do not permit seven days for comment, the agency official shall notify the Council, the SHPO/THPO and the Indian tribe or Native Hawaiian organization and invite any comments within the time available.*

*(c) Local governments responsible for section 106 compliance. When a local government official serves as the agency official for section 106 compliance, paragraphs (a) and (b) of this section also apply to an imminent threat to public health or safety as a result of a natural disaster or emergency declared by a local government's chief executive officer or legislative body, provided that if the Council or SHPO/THPO objects to the proposed action within seven days, the agency official shall comply with §§ 800.3 through 800.6.*

*(d) Applicability. This section applies only to undertakings that will be implemented within 30 days after the disaster or emergency has been formally declared by the appropriate authority. An agency may request an extension of the period of applicability from the Council prior to the expiration of the 30 days. Immediate rescue and salvage operations conducted to preserve life or property are exempt from the provisions of section 106 and this part.*

**ATTACHMENT 3**

**EMERGENCY PROCEDURES PER 50 CFR 402.05  
SECTION 7 OF ENDANGERED SPECIES ACT**

50 CFR 402.05 – Emergencies  
Section 7 of Endangered Species Act

*(a) Where emergency circumstances mandate the need to consult in an expedited manner, consultation may be conducted informally through alternative procedures that the Director determines to be consistent with the requirements of sections 7(a)-(d) of the Act. This provision applies to situations involving acts of God, disasters, casualties, national defense or security emergencies, etc.*

*(b) Formal consultation shall be initiated as soon as practicable after the emergency is under control. The Federal agency shall submit information on the nature of the emergency action(s), the justification for the expedited consultation, and the impacts to endangered or threatened species and their habitats. The Service will evaluate such information and issue a biological opinion including the information and recommendations given during the emergency consultation.*

Chapter 8 of the ESA Section 7 Consultation Handbook (1998)

- USACE (or other federal lead agency) notifies USFWS/NMFS about emergency and solicits minimization/conservation measures prior to emergency activities
  - o Location & nature of emergency, potential response to abate hazards
- Applicant responds to emergency
- Initiate formal consultation as soon as practicable after emergency is under control
- Service provides after the fact Biological Opinion

**ATTACHMENT 4**

**EMERGENCY PROCEDURES PER 33 CFR 230.8  
EMERGENCY ACTIONS, NATIONAL ENVIRONMENTAL POLICY ACT**

### 33 CFR 230.8 – Emergency Actions

CEQ refers to the Council on Environmental Quality

*In responding to emergency situations to prevent or reduce imminent risk of life, health, property, or severe economic losses, district commanders may proceed without the specific documentation and procedural requirements of other sections of this regulation. District commanders shall consider the probable environmental consequences in determining appropriate emergency actions and when requesting approval to proceed on emergency actions, will describe proposed NEPA documentation or reasons for exclusion from documentation. NEPA documentation should be accomplished prior to initiation of emergency work if time constraints render this practicable. Such documentation may also be accomplished after the completion of emergency work, if appropriate.,*

*Emergency actions include Flood Control and Coastal Emergencies Activities pursuant to Pub. L. 84-99, as amended, and projects constructed under sections 3 of the River and Harbor act of 1945 or 14 of the Flood Control Act of 1946 or the Continuing Authorities Program. When possible, emergency actions considered major in scope with potentially significant environmental impacts shall be referred through the division commanders to HQUSACE (CECW-RE) for consultation with CEQ about NEPA arrangements.*

**ATTACHMENT 5**

**33 USC 2349 SEC 1005(b) (WRDA 2014)  
CATEGORICAL EXCLUSIONS IN EMERGENCIES**

33 USC 2349 sec 1005(b) (WRDA 2014) Categorical Exclusions in Emergencies-

*For the repair, reconstruction, or rehabilitation of a water resources project that is in operation or under construction when damaged by an event or incident that results in a declaration by the President of a major disaster or emergency pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.), the Secretary shall treat such repair, reconstruction, or rehabilitation activity as a class of action categorically excluded from the requirements relating to environmental assessments or environmental impact statements under section 1508.4 of title 40, Code of Federal Regulations (or successor regulations), if the repair or reconstruction activity is—*

*(1) in the same location with the same capacity, dimensions, and design as the original water resources project as before the declaration described in this section; and*

*(2) commenced within a 2-year period beginning on the date of a declaration described in this subsection.*