

## Section 408/Rivers and Harbors Act: Federal Court Addresses Challenge to Ancillary Use of Levee



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The United States District Court for the District of Oregon (“Court”) addressed an issue involving the Rivers and Harbors Act. *See Columbia Riverkeeper v. Caswell*, Case No. 3:24-cv-00868-AN, 2025 WL 2256295, at \*1, (D. Or. Aug. 7, 2025).

Columbia Riverkeeper and 1000 Friends of Oregon (collectively, “Riverkeeper”) argued that the Corps did not follow proper procedure when it approved NXTClean Fuels (“NEXT”) use of a road on top of a levee to transport construction materials for a proposed renewable diesel fuel refinery at Port Westward Industrial Park near Clatskanie, Oregon.

On August 7, 2025, the United States District Court for the District of Oregon issued an order denying the Corps’ motion to dismiss a suit filed by Riverkeeper.

Pursuant to the Rivers and Harbors Act, the Corps has the authority to grant permission to other parties to alter or occupy public works of the United States. That authority is derived from a provision of the Rivers and Harbors Act commonly known as “Section 408.”

The substantive issue raised by Riverkeeper was the Corps permitting NEXT’s use of a road on top of the Bradbury Slough levee. The levee is a Corps-constructed civil works project. NEXT planned to use the road on top of the levee to transport heavy equipment and building materials to the construction site.

Section 408 approval from the Corps is needed for permission to alter or occupy public works. However, the Corps informed NEXT on April 7, 2022, that its use of the road on top of the levee would not be subject to full Section 408 review.

The Corps determined that using the levee as a haul road would not qualify as “use” of the levee. Further, the Corps concluded that NEXT hauling materials on the road would not alter the levee, and the refinery itself would not be in navigable waters or affect navigation. Therefore, it deemed further review unnecessary.

Riverkeeper filed an action alleging the Corps did not properly follow its own Section 408 procedure regarding NEXT’s use of the road. They argued that hauling heavy construction equipment across the road could damage the levee and have adverse environmental effects, specifically flooding and the contamination of nearby water sources.

The Corps filed a motion to dismiss, arguing three points:

1. Riverkeeper had no standing to bring a claim;
2. there is no final agency action being challenged; and
3. the claim itself was unripe for adjudication.

For organizations such as Riverkeeper to have standing to sue, a member must have suffered:

1. an injury in fact;
2. that is fairly traceable to the challenged conduct; and
3. is likely to be redressed by a favorable judicial decision.

The Court found that the nonprofits did allege sufficient injury to have standing. The risk of increased pollution and flooding was sufficiently concrete and particular for the groups to file an action. Further, the Court stated that NEXT's use of the levee road could not have happened without the Corps' Section 408 determination. This established causation.

The Court next found that vacating the letter that effectively gave NEXT permission to use the road without undergoing the full Section 408 review could likely redress the harm Riverkeeper asserted. This solidified their standing.

The Court then addressed the finality of agency action argument. It found that the Corps' representation to NEXT that its use of the levee road would not be subject to full Section 408 review was a final decision.

Consequently, that decision could be challenged by Riverkeeper. Additionally, the Court rejected the Corps' argument that its decision was not final because NEXT would need further permits to begin construction of the refinery. It also found that legal consequences flowed from the Corps' Section 408 determination for NEXT. This underscored that the Corps' determination was a final decision.

Finally, the Court held that Riverkeeper' claim was ripe for review. Delaying the review could cause hardship to Riverkeeper, and such review would not interfere with administrative action. In addition, there was no need for additional factual development with the situation because the Corps had already made a decision about the Section 408 review.

The Court denied the Corps' motion to dismiss.

A copy of the Opinion and Order can be downloaded [here](#).