



National Wildlife Federation

National Advocacy Center

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February 12, 2019

Via Email: WRDA2018@usace.army.mil

Ms. Ada Benavides

Senior Policy Advisor

Headquarters, U.S. Army Corps of Engineers

441 G Street NW., Room 3F86

Washington, DC 20314-1000

Re: Implementation Guidance for the Water Resources Development Act of 2018

Dear Ms. Benavides:

The National Wildlife Federation appreciates the opportunity to comment on implementation guidance for the Water Resources Development Act of 2018, the Water Resources Development Act of 2016, and the Water Resources Reform and Development Act of 2014.

The National Wildlife Federation (NWF) is the nation's largest conservation education and advocacy organization with almost six million members and supporters, and affiliate conservation organizations in 51 states and territories. NWF has a long history of working to modernize federal water resources planning to protect the nation's coasts, rivers, wetlands and floodplains, and the fish and wildlife that depend on those vital resources.

The increasing storms, floods, and droughts being wrought by climate change make it more important than ever for the U.S. Army Corps of Engineers (Corps) to utilize modern and environmentally sound approaches when planning water resources projects. NWF urges the Corps to adopt the recommendations outlined below to help ensure that federal investments in the nation's water resources will protect and restore the environment, as required by a host of federal environmental laws and policies including the National Water Resources Planning Policy (WRDA 2007 § 2031, 42 USC 1962–3), and increase the resiliency of people and wildlife to climate change.

Water Resources Development Act of 2018

Section 1115. Property Acquisition:

Section 1115 requires the Secretary to “first consider the minimum interest in real property” needed to support a water resources projects when acquiring an interest in land or requiring a non-Federal sponsor to do so. The language further requires the Secretary to “first consider a temporary easement or other interest designed to reduce the overall cost” of the project.

While the National Wildlife Federation recognizes the value of reducing overall project costs, it is essential that the implementing guidance for Section 1115 ensure that legal requirements and

fundamental project goals and objectives drive the determination of “the minimum interest in real property” needed to support a water resources project. Of particular concern is ensuring the appropriate assessment of the “minimum interest in real property” needed for mitigation and for lands and waters targeted for restoration or natural infrastructure.

Mitigation: Lands required for mitigation (and mitigation buffers) of permanent or long-term adverse impacts from water resources projects require use of a permanent interest in real property. This is required by: (i) the fundamental objective of mitigation; (ii) the significant difficulties inherent in producing ecologically successful restoration that replaces all lost functions and values and adequately accounts for the time it takes for the establishment of mature wetlands and wetland forests; and (iii) the mitigation standards applicable to Corps civil works projects. Among many other requirements, the Corps’ civil works mitigation must comply with “the mitigation standards and policies established pursuant to the regulatory programs administered by the Secretary.” 33 USC § 2283(d). These regulatory program standards require the long-term protection of mitigation lands and the permanent protection of “preservation sites.”¹

Restoration and Natural Infrastructure: Lands targeted for restoration or use as natural infrastructure also require use of a permanent interest in real property (e.g., through ownership in fee simple or a permanent easement) to ensure the ecological sustainability of the promised project benefits and the wise use of taxpayer dollars. Benefits achieved as a result of restoration projects and/or use of natural infrastructure approaches will be lost if the restored areas are developed, adversely modified, or converted to other uses. Such changes would be allowed upon expiration of a temporary easement or other temporary interest in lands obtained for these purposes, leading to the inappropriate termination of vital project benefits and to the significant waste of taxpayer dollars.

Exceptions to requiring a permanent interest in real property for restoration and natural infrastructure projects should be extremely limited and should require documentation that a temporary interest will ensure the long-term ecological sustainability of the restoration or natural infrastructure measure. For example, in some circumstances, areas that are currently an integral component of a restoration or natural infrastructure project but are likely to be inundated by sea level rise in the coming decades may be appropriate for an exception to a permanent interest.

NWF urges that the implementation guidance for this section:

- (1) Explicitly state that temporary easements or other temporary interests in land are not appropriate for mitigation, and may not be used to obtain lands for any form of civil works mitigation (e.g., Corps-implemented preservation, restoration, or enhancement; mitigation banks; or in lieu fee programs).

¹ *E.g.*, 33 CFR 332 (mitigation site protection instruments must include a “description of the legal arrangements and instrument, including site ownership, that will be used to ensure the long-term protection of the compensatory mitigation project site” and preservation mitigation requires “permanent” protection of the preservation site); 33 CFR 332.4(c) (requiring mitigation plans to include a site protection instrument that provides a “description of the legal arrangements and instrument, including site ownership, that will be used to ensure the long-term protection of the compensatory mitigation project”); 33 CFR 332.7 (describing the requirements for ensuring long-term protection, management, and sustainability of mitigation sites, including a requirement that the “permit conditions or instrument must identify the party responsible for ownership and all long-term management of the compensatory mitigation project”); 33 CFR 332.8 (requiring that each prospectus for a mitigation bank or in lieu fee program include information on “proposed ownership arrangements and long-term management strategy for the mitigation bank or in-lieu fee project sites”).

- (2) Explicitly state that temporary easements or other temporary interests in land are not appropriate for, and may not be used to obtain, lands and waters that will be counted as providing restoration benefits or that will be utilized for natural infrastructure except in the most limited of circumstances. The implementing guidance should further clarify that exceptions to requiring a permanent interest in real property for restoration and natural infrastructure projects will require documentation that a temporary interest will ensure the long-term ecological sustainability of the restoration or natural infrastructure measure. For example, in some circumstances, areas that are currently an integral component of a restoration or natural infrastructure project but are likely to be inundated by sea level rise in the coming decades may be appropriate for an exception to a permanent interest.

Section 1116. Dredged Material management Plans:

Section 1116 directs the Secretary to expedite the dredged material management plan process, “make maximum use of existing information, studies, and innovative dredged material management practices, and avoid any redundant information collection and studies.”

The National Wildlife Federation supports the development and implementation of scientifically and ecologically sound dredged material management plans. However, it is critical that these plans be developed using up-to-date data and samples and modern studies developed with a high degree of scientific rigor. The implementation guidance should ensure that the mandate to “avoid any redundant information and collection studies” is not used to evade undertaking needed studies or data collection activities, and is not used as a justification for relying on outdated data, information or studies.

NWF urges that the implementation guidance for this section:

- (1) Clarify that the development of dredged material management plans must be based on high quality and up-to-date science, information, analyses, studies and data including: sediment samples and testing to determine contamination levels, water quality sampling, fish tissue sampling, benthos sampling, and other needed biological sampling.
- (2) Clarify that the Section’s directive to “avoid any redundant information and collection studies” may not be used as a justification to: avoid collecting new data when such data is necessary for proper planning; rely on outdated data or information; or rely on outdated or otherwise questionable studies and information. Data samples and tests that are more than five years old should be presumed to be outdated for the development of a dredged material management plan unless clearly demonstrated otherwise.

Section 1126. Purpose and Need:

Section 1126 requires, among other things, that the District Engineer either concur with an applicant’s purpose and need statement for a water storage project or provide the District Engineer’s assessment of an appropriate purpose and need for such project within 90 days after the date of receipt of a complete application for a water storage project.

The National Wildlife Federation recognizes the critical importance of a correctly formulated purpose and need statement for the purposes of the National Environmental Policy Act. An appropriate statement of purpose and need is crucially important to the adequacy of an environmental review because that

statement “delimit[s] the universe of the action's reasonable alternatives.”² This is because “[o]nly alternatives that accomplish the purposes of the proposed action are considered reasonable, and only reasonable alternatives require detailed study. . . .”³

As the Courts have long acknowledged:

“One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing “reasonable alternatives” out of consideration (and even out of existence). . . . If the agency constricts the definition of the project’s purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act. 42 U.S.C. § 4332(2)(E).”⁴

Accordingly, the Courts have made it clear that an agency may not define a project so narrowly that it “forecloses a reasonable consideration of alternatives”⁵ or makes the final EIS “a foreordained formality.”⁶ The implementation guidance should clarify that the District Engineer must reject an applicant’s purpose and need statement if that statement does not comply with NEPA, and may only recommend a purpose and need statement that does comply with NEPA.

² *Citizens Against Burlington v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991). See also *Wyoming v. U.S. Dep’t of Agric.*, 661 F.3d 1209, 1244 (10th Cir. 2011) (“how the agency defines the purpose of the proposed action sets the contours for its exploration of available alternatives.”); *Sierra Club v. U.S. Dep’t of Transp.*, 310 F.Supp.2d 1168, 1192 (D. Nev. 2004) (citing *City of Carmel-By-The-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997)).

³ *Webster v. U.S. Department of Agriculture*, 685 F.3d 411, 422 (4th Cir. 2012); *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 815-16 (9th Cir. 1987).

⁴ *Simmons v. United States Army Corps of Eng’rs*, 120 F.3d 664, 666 (7th Cir. 1997). See also *City of Bridgeton v. FAA*, 212 F.3d 448, 458 (8th Cir. 2000); *City of Carmel-by-the-Sea v. United States Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) (“an agency cannot define its objectives in unreasonably narrow terms”); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195-96 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 994 (1991) (“an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action”); *City of New York v. United States Dep’t of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983), *cert. denied*, 456 U.S. 1005 (1984) (“an agency will not be permitted to narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered”); *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 815-16 (9th Cir. 1987) (impact statements must consider all reasonable alternatives that accomplish project purpose, but need not consider alternatives not reasonably related to purpose).

⁵ *Fuel Safe Washington v. Fed. Energy Regulatory Comm’n*, 389 F.3d 1313, 1324 (10th Cir. 2004) (quoting *Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir. 2002); *Citizens’ Comm. To Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002); *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998) (“An agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action”.); *Simmons v. United States Army Corps of Eng’rs*, 120 F.3d 664, 666 (7th Cir. 1997); *City of New York v. United States Dep’t of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983), *cert. denied*, 456 U.S. 1005 (1984) ((holding that “an agency may not narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered”); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991), *cert. denied* 502 U.S. 994 (1991).

⁶ *City of Bridgeton v. FAA*, 212 F.3d 448, 458 (8th Cir. 2000) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991), *cert. denied* 502 U.S. 994 (1991); citing *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 666 (7th Cir. 1997)).

NWF urges that the implementation guidance:

- (1) Clarify that the District Engineer may only concur in a statement of purpose and need provided by an applicant if that statement complies with the requirements of the National Environmental Policy Act. The statement may not be so narrowly drawn as to foreclose a reasonable consideration of alternatives or make the final EIS a foreordained formality.
- (2) Clarify that the District Engineer may only recommend a statement of purpose and need if that statement complies with the requirements of the National Environmental Policy Act. The statement may not be so narrowly drawn as to foreclose a reasonable consideration of alternatives or make the final EIS a foreordained formality.
- (3) Encourage the District Engineer to confer carefully with legal counsel prior to either concurring or recommending a statement of purpose and need under this Section.

Section 1149. Inclusion of Alternative Measure for Aquatic Ecosystem Restoration:

Section 1149(c) states that feasibility studies for flood risk management or hurricane and storm damage risk reduction projects “shall consider” use of natural infrastructure alternatives, alone or in combination with traditional infrastructure, “if those alternatives are practicable.”

The National Wildlife Federation strongly supports increased use of natural infrastructure solutions — actions that protect and restore healthy rivers, floodplains, wetlands, and shorelines — to reduce flood and storm damages. Natural infrastructure solutions have a proven track record of reducing flood and storm damages for communities while protecting the environment; avoiding catastrophic levee, floodwall, and dam failures; and reducing overall project costs. Natural infrastructure measures can also be used in combination with non-structural and structural measures to increase levels of protection and improve environmental health. The implementing guidance should provide meaningful direction and supporting information to assist Corps planners in developing effective and practicable natural infrastructure solutions.

NWF urges that the implementation guidance for this section:

- (1) Describe the types of activities that qualify as natural infrastructure alternatives for purposes of section 1149 to include at least the following:

For the purposes of section 1149, natural infrastructure is the strategic use, restoration, or management of natural lands and waters to conserve and restore ecosystem functions and/or reduce flood or storm damages. Natural infrastructure alternatives seek to use, enhance, facilitate, protect or restore naturally occurring hydrologic, geomorphic, biological, chemical and ecological functions and processes of streams, rivers, floodplains, wetlands, or shorelines. Natural infrastructure includes natural and nature-based features, as defined by 33 U.S.C. 2289a. Actions that qualify for use in a natural infrastructure alternative include, but are not limited to: (i) acquisition of land or easements, including flooding easements; (ii) removal of structures such as dams, levees, and culverts to restore natural hydrology, form, function, or ecological processes; (iii) modification of structures such as dams and levees, including through sediment diversions or levee setbacks, to restore natural hydrology, form, function, or ecological processes; (iv) reoperation of dams and reservoirs to restore or better mimic natural hydrology and flow patterns (v) restoration efforts designed to reestablish natural hydrology, form, function, or processes of rivers, streams, floodplains, wetlands, or shorelines; (vi) creation or restoration of living shorelines; (vii) removal of nonnative vegetation or reintroduction of native vegetation; and/or (viii) other actions that would reduce flood or storm hazard intensifying conditions by restoring the environment.

- (2) Clarify that natural infrastructure measures can work effectively in combination with a wide range of other measures, including: (i) non-structural approaches which include such things as relocation, demolition, or elevation of flood-prone properties; measures to increase water conservation and efficiency; building or construction requirements or standards; and land use restrictions or limitations; (ii) changes to the operation of existing water resources projects through updates to water control manuals and navigation operations and maintenance plans; and (iii) traditional engineered infrastructure.
- (3) Provide a definition for the term “practicable” that is consistent with existing regulatory definitions. Both Corps and Environmental Protection Agency regulations define “practicable” as “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” 33 CFR 335.7; 40 CFR 23.10(a).
- (4) Clarify that the directive to “consider” natural infrastructure requires an intensive and careful examination of such approaches. To achieve this objective, the guidance should further clarify that:
 - a. Natural infrastructure solutions are presumed to be available unless it is clearly demonstrated in writing that such solutions cannot provide, or significantly contribute to, an appropriate level of protection.
 - b. A natural infrastructure solution may not be rejected as being impracticable simply because it may not be able to address all identified problems. In such cases, natural infrastructure must be considered in combination with non-structural approaches, operational changes, and/or traditional engineered structures.
 - c. Absent a clear demonstration that no practicable natural infrastructure solutions are available, the final array of alternatives must include at least one natural infrastructure alternative that receives a full and detailed environmental and economic analysis.
- (5) Clarify that the section 1149(c) mandates must be followed in the preparation of all flood and storm damage reduction feasibility studies, irrespective of any stated interest or objection that may be raised by the non-Federal sponsor. The fundamental purpose of section 1149(c) is to ensure that natural infrastructure approaches are fully considered, and where appropriate selected, for every federally authorized flood or storm damage reduction feasibility study whether carried out by the Corps or by a non-federal sponsor.
- (6) Clarify that, as with all other types of alternatives, the Corps shall document the benefits and costs of natural infrastructure alternatives in a manner that allows meaningful comparison with the benefits and costs of traditional infrastructure. The guidance should direct that the assessment of benefits of both natural infrastructure and traditional infrastructure alternatives shall: (i) account for, including where appropriate by assessing the value of ecosystem services, flood and storm attenuation benefits across alternative types by evaluating and valuing such things as coastal or riverine erosion prevention, wave attenuation, wind reduction, storm surge attenuation, floodwater storage, and water storage and absorption; (ii) ensure full assessment of benefits by evaluating and valuing benefits from natural infrastructure that go beyond flood and storm damage reduction, including such things as fish and wildlife habitat, biological regulation, groundwater recharge, nutrient regulation, cultural and social justice benefits; and (iii) in assessing the benefits of projects utilizing a combination of natural infrastructure and traditional

infrastructure solutions, include an evaluation and valuation of: additional levels of storm or flood protection, increased survivability of structures, and reduced maintenance costs resulting from the natural infrastructure component. The guidance should direct that the assessment of project costs of both natural infrastructure and traditional infrastructure alternatives shall include a line item that accounts for the costs of any lost or forgone ecosystem services, and a line item that accounts for the costs of any needed mitigation.

- (7) Direct planners to review current science and economic literature documenting the efficacy and cost effectiveness of natural infrastructure in reducing flood and storm damages, and provide key citations to recent literature.

Finally, as you work to implement Section 1149, we recommend that you share examples of successful natural infrastructure measures with Corps planners. Natural infrastructure measures have been produced demonstrable flood and storm damage reduction benefits across the country. For example:

- During Hurricane Sandy, wetlands prevented \$625 million in flood damages in the 12 affected coastal states; and in the four states with the greatest wetland coverage, wetlands reduced damages by 20% to 30%.⁷
- During Hurricane Katrina, coastal wetlands reduced storm surge in some New Orleans neighborhoods by two to three feet, and levees with wetland buffers had a much greater chance of surviving than levees without wetland buffers.
- The purchase of 12,000 acres in easements along the 45-mile Iowa River corridor saved local communities an estimated \$7.6 million in flood damages over a ten year period.⁸ The easement purchase effort began after the historic 1993 floods.
- Restoration of wetlands and lands adjacent to 19 stream corridors in Staten Island, New York “successfully removed the scourge of regular flooding from southeastern Staten Island, while saving the City \$300 million in costs of constructing storm water sewers.”⁹ Approximately 400 acres of freshwater wetland and riparian stream habitat has been restored along 11 miles of stream corridors that collectively drain one third of Staten Island’s land area.
- The city of Tulsa Oklahoma responded to the devastating flood of 1984 by developing and implementing a plan that restored open space where floodwater can safely overflow, created permanent lakes, and relocated buildings from the Mingo Creek floodplain. Local property owners and businesses have not suffered major property losses due to flooding since the project was completed, and Tulsa’s residents have received up to a 35% discount on their flood insurance rates.¹⁰
- In Vermont, a vast network of floodplains and wetlands, including those protected by 23 conservation easements protecting 2,148 acres of wetland along Otter Creek, saved Middlebury \$1.8 million in flood damages during Tropical Storm Irene, and between \$126,000 and \$450,000 during each of 10 other flood events. Just 30 miles upstream, in an

⁷ Narayan, S., Beck, M.B., Wilson, P., et al., The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA. *Scientific Reports* 7, Article number 9463 (2017), doi:10.1038/s41598-017-09269-z (available at <https://www.nature.com/articles/s41598-017-09269-z>).

⁸ Natural Resources Conservation Service, Restoring America’s Wetlands (available at https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/16/nrcs143_006638.pdf).

⁹ Cooper Union, Institute for Sustainable Design, *The Staten Island Bluebelt: A Study In Sustainable Water Management* (<http://cooper.edu/isd/news/waterwatch/statenisland>). These effort was started in 1990.

¹⁰ Naturally Resilient Communities Case Study, available at <http://nrcsolutions.org/tulsa-oklahoma/>

area without such floodplain and wetland protections, Tropical Storm Irene caused extensive flooding to the city of Rutland.¹¹

Section 1152. Study of Water Resources Development Projects by Non-Federal Interests:

Section 1152(c) requires the Secretary to fully evaluate, and submit a written report to Congress on, a federally authorized water resources study prepared by a non-Federal sponsor within 180 days of receipt of that study.¹² The written report to Congress must describe: (i) whether “the study, and the process under which the study was developed, each comply with Federal laws and regulations applicable to feasibility studies of water resources development projects”¹³; (ii) whether the project is feasible; (iii) any recommendations regarding the plan or design of the project; and (iv) any conditions the Secretary may require for construction. Section 1152(c) also directs the Secretary to provide technical assistance to the non-Federal sponsor on the feasibility study if the non-Federal sponsor pays all associated costs; and requires the Secretary to ensure that the use of such funds “will not affect the impartial decisionmaking of the Secretary, either substantively or procedurally.”

While the National Wildlife Federation appreciates the important benefits that can be achieved through the Section 1152 non-Federal interest study process, those benefits can only be realized if the studies carried out by non-Federal sponsors comply fully with the substantive and procedural legal and technical requirements applicable to water resources studies carried out by the Secretary. Such compliance is essential for protecting the environment, public health and safety, federal taxpayers, and the public’s ability to provide meaningful input into projects that can have a profound impact on their lives and livelihoods. NWF’s experience with studies carried out by some non-Federal sponsors strongly supports our call for explicit guidance on these requirements.

The inclusion of detailed guidance on a non-Federal sponsor’s project study obligations will facilitate and expedite the development of legally-compliant studies and prevent unnecessary delays resulting from such things as the need to undertake additional studies, obtain additional approvals, or re-issue studies for public comment due to a lack of clarity regarding substantive and procedural legal requirements. The implementing guidance should provide clear direction to non-Federal sponsors on their project study obligations, and adopt procedures to ensure that the Secretary can make a meaningful and impartial assessment of the study in the limited time provided by Section 1152.¹⁴

NWF urges that the implementation guidance for this section:

- (1) Explicitly confirm that non-Federal sponsors must comply with all substantive and procedural Federal laws and regulations applicable to feasibility studies of water resources development projects carried out by the Secretary.

¹¹ K.B. Watson, et al, *Quantifying flood mitigation services: The economic value of Otter Creek wetlands and floodplains to Middlebury, VT*, *Ecological Economics* 130 (2016) 16-24, <https://doi.org/10.1016/j.ecolecon.2016.05.015>.

¹² Section 1152 amends 33 U.S.C. § 2231.

¹³ 33 U.S.C. § 2231(b).

¹⁴ The existing guidance documents regarding preparation of studies by non-Federal sponsors do not achieve these vital objectives.

- (2) Provide a detailed listing of the applicable laws that must be followed, and highlight key substantive and procedural requirements, including but not limited to the critical importance of complying with:
- a. The National Environmental Policy Act (NEPA), including its requirement to meaningfully engage the public. To help facilitate effective public engagement in the NEPA process, as required by law, the implementing guidance should:
 - i. Establish a process for ensuring the broad dissemination of public comment opportunities, including through publication in the Federal Register with the assistance of the Corps. NWF strongly recommends providing a minimum of 60 days for public comment to provide sufficient time for members of the public to meaningfully review the typically complex and extensive study materials and prepare comments. Formal public comment periods are required on the scope of the environmental review and on draft and final environmental impact statements. Formal public comment periods should also be required on draft and final environmental assessments.
 - ii. Clarify that a public comment period on an incomplete environmental impact statement or draft environmental assessment will not satisfy NEPA, and will preclude a finding by the Secretary that the study is in compliance with the law under 33 U.S.C. § 2231(b).¹⁵ All analyses required under NEPA, including the documentation outlined throughout these comments on Section 1152, must be included in a draft environmental impact statement or draft environmental assessment released for public comment. As the U.S. Court of Appeals for the Tenth Circuit has made clear, “[a] public comment period is beneficial only to the extent the public has meaningful information on which to comment.”¹⁶
 - b. The Clean Water Act, including the substantive and analytical requirements of Clean Water Act Section 404 and the 404(b)(1) Guidelines,¹⁷ and requirement to obtain any needed Clean Water Act Section 401 State Water Quality Certifications. The implementing guidance should require inclusion of at least a draft 404(b)(1) Guidelines analysis with the draft environmental impact statement or draft environmental assessment to facilitate meaningful public comment.
 - c. The Federal Endangered Species Act. The implementing guidance should further clarify that Endangered Species Act-required documents are to be provided to the public along with the draft environmental impact statement or draft environmental assessment to facilitate meaningful public comment.
 - d. The Fish and Wildlife Coordination Act. The implementing guidance should further clarify that all Planning Aid Letters and at least a draft Fish and Wildlife Coordination Act report are to be provided as part of the draft environmental impact statement or draft environmental assessment to facilitate meaningful public comment.

¹⁵ The need to establish clear guidance on this issue is exemplified by the recently released draft feasibility study and environmental impact statement for the Pearl River Basin, Mississippi, Federal Flood Risk Management Project, Hinds and Rankin Counties, Mississippi. This study, which was prepared by the non-Federal sponsor under Section 211, was released for public comment even though numerous critically important and legally-required analyses were missing from the document.

¹⁶ *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 708 (10th Cir. 2009).

¹⁷ As the Corps is aware, civil works projects must comply with the substantive and analytical requirements of Clean Water Act Section 404 and the 404(b)(1) Guidelines, even though the Corps does not issue itself an actual permit. 40 C.F.R. § 230.2; 33 C.F.R. § 336.1.

- e. The full suite of mitigation requirements applicable to Corps civil works projects, including the requirements to: mitigate all impacts that are more than “negligible”; include detailed and highly specific mitigation plans; carry out mitigation monitoring until ecological success is established; mitigate impacts to not less than “in-kind” conditions; comply with “the mitigation standards and policies established pursuant to the regulatory programs administered by the Secretary”; and implement mitigation prior to, or concurrently with, project construction. 33 U.S.C § 2283.
 - f. The Independent External Peer Review requirements, including the requirements regarding public notification; and the Corps’ internal peer review requirements. 33 U.S.C. § 2343. The implementing guidance should further clarify that any initial reports (draft or final) and responses prepared by an Independent External Peer Review panel are to be provided as part of the draft environmental impact statement or draft environmental assessment to facilitate meaningful public comment.
 - g. The requirement to consider natural infrastructure alternatives, alone or in combination with traditional infrastructure, “if those alternatives are practicable” in each feasibility study for flood risk management or hurricane and storm damage risk reduction projects. WRDA 2018, Section 1149(c).
 - h. The requirement to consider nonstructural alternatives when planning flood damage reduction projects. 33 U.S.C. § 701b-11.
 - i. The National Water Resources Planning Policy requirement that all federal water resources projects are to “protect[]and restor[e] the functions of natural systems and mitigat[e] any unavoidable damage to natural systems.” 42 U.S.C. 1962-3.
- (3) Clarify that non-Federal interests must provide planning and design data on the Internet and upon a request from members of the public, as the Corps also must do. The Secretary is required to use available funds to “make publicly available, including on the Internet all data in the custody of the Corps of Engineers on” among other things “the planning, design, construction, operation, and maintenance of water resources development projects.” 33 U.S.C. § 2342. The Secretary must make this data publicly available “as quickly as practicable after the data is generated by the Corps of Engineers.” *Id.*
- (4) Strongly encourage the non-Federal sponsor to undertake early coordination with the Corps, the U.S. Fish and Wildlife Service and/or the National Oceanic and Atmospheric Administration as applicable, the Environmental Protection Agency, and state resource agencies.
- (5) Establish an interim review process during which the Corps can provide an initial assessment of the non-Federal sponsor’s compliance with substantive and procedural legal requirements before the non-Federal sponsor moves to the next step of the study development process. As part of this interim review process, the implementing guidance should direct the Corps to provide an initial assessment of at least the following:
- a. Whether the scope and nature of the water resources problem being studied warrants Federal participation. If it is not in the Federal interest, the study should be terminated as early as possible to save time and resources;
 - b. Whether the identified project purpose and need statement meets the standards established by the National Environmental Policy Act;

- c. Whether the appropriate level of independent review is being carried out, including Independent External Peer Review under 33 U.S.C. § 2343, and whether the statutory and other requirements for such reviews are being complied with;
 - d. Whether the draft environmental impact statement or draft environmental assessment is appropriate for release for public comment based on an initial assessment of legal compliance, level of detail, technical evaluations, and inclusion of required materials and analyses; and
 - e. Whether the public notice, engagement, and commenting processes being used by the non-Federal sponsor are adequate or whether additional efforts or more extensive efforts to engage the public are required.
- (6) Clarify that the Corps will take control of the handling of peer, policy, and legal reviews, as provided for in ER 1105-2-100, where the interim review process identifies problems that are not fully addressed by the non-Federal sponsor. ER 1105-2-100 provides that:

“Decision Documents Prepared by Sponsors. For a decision document prepared by a non-Federal interest, such as under the authority of Section 211 of WRDA 1996, the District should encourage the non-Federal interest to utilize the review and approval processes described in this appendix in order to receive timely input on the adequacy of their report and maximize the opportunity for approval by the Secretary. If the non-Federal interest chooses some other path, the District should expect to conduct peer, policy and legal reviews of the final decision document, or possibly some interim product, and to provide the results of their reviews to the MSC and RIT along with advice on whether the report should be approved. The MSC will endorse the District's findings with its own views on approval and advise the RIT regarding the adequacy of the District's reviews. The RIT will engage an OWPR policy and legal compliance review, and forward the results to ASA(CW) with summary advice regarding the consistency of the document with technical, policy and legal requirements, and a recommendation to approve or not approve the report. The District will retain responsibility for fulfilling the NEPA requirements, including any necessary scoping meetings, public reviews, filings with EPA, executing a FONSI, and/or providing the draft ROD for HQUSACE or ASA(CW) signature, as appropriate. A report prepared by non-Federal interests may still require a Chief's Report (i.e., Section 203 reports), so a CWRB and follow-on procedures may be necessary.”¹⁸

- (7) Prohibit the use of emergency procedures for implementing NEPA in the development of studies prepared by non-Federal sponsors under this section.
- (8) Clarify that in making the determination required under 33 U.S.C. § 2231(b), the Secretary will review each feasibility study and environmental evaluation developed by a non-Federal sponsor with rigor, and will consider and take full account of comments on the study submitted by other federal agencies, states, tribes, and members of the public.
- (9) Clarify that the Secretary shall bear the ultimate responsibility for ensuring full compliance with the procedural and substantive legal requirements applicable to studies carried out by a non-Federal sponsor, including legal liability for any non-compliance with the National Environmental

¹⁸ ER 1105-2-100 Appendix H, Amendment #1 20 Nov 07, at paragraph H-8 (available at https://www.publications.usace.army.mil/Portals/76/Publications/EngineerRegulations/ER_1105-2-100.pdf)

Policy Act, the Federal Endangered Species Act, the Clean Water Act and other applicable laws. This requirement will provide an avenue for appropriate redress of grievances and help ensure impartial decisionmaking by the Corps.

Section 1153. Construction of Water Resources Development Projects by Non-Federal Interests:

Section 1153 provides, among other things, that a non-Federal interest is not required “to obtain any Federal permits or approvals that would not be required if the Secretary carried out the project or separable element” for projects carried out under Section 1153 provided the non-Federal interest has entered into a written agreement with the Secretary that satisfies the requirements established by Section 1153. However, this directive is subject to two important exemptions: (1) the non-Federal interest must obtain Federal permits or approvals where “significant new circumstances or information relevant to environmental concerns or compliance have arisen since development of the project recommendation;” and (2) in all cases, the non-Federal interest is “required to obtain a certification from a State under Federal law to carry out the project,” if such a certification would otherwise be required.

Given the complex nature of Section 1153, the National Wildlife Federation urges that the implementing guidance clearly identify the applicable permits, approvals, and certifications subject to this Section. The implementing guidance should also provide direction regarding the “legal and technical requirements” that must be complied with under the Section 1153 written agreement, and the legal implications of a determination that “significant new circumstances or information relevant to environmental concerns or compliance have arisen since development of the project recommendation.”

NWF urges that the implementation guidance for this section:

- (1) Clearly describe the types of Federal permits and approvals that must still be obtained by the non-Federal sponsor because they would be required for a project constructed by the Secretary. These include at least the following:
 - a. Permits or approvals required pursuant to the Federal Endangered Species Act, including Biological Opinions and Incidental Take Permits.
 - b. Permits or approvals required pursuant to the Marine Mammal Protection Act, including Incidental Take Permits.
 - c. Approvals required by a coastal state under the Coastal Zone Management Act, including state concurrence with a Consistency Determination.
 - d. Permits or approvals required by Clean Water Act Sections 401, 402, and a state dredge and fill permit in those states with delegated Clean Water Act 404 authority (see also, recommendation (3) below).
- (2) Clarify that the new “Certifications” provision, which will be codified at 33 U.S.C. § 2232(b)(3), requires a non-Federal sponsor to obtain a state Clean Water Act Section 401 Water Quality Certification, and a state dredge and fill permit in those states with delegated Clean Water Act 404 authority. As noted in recommendation (1) above, the non-Federal sponsor is also required to obtain a state concurrence with a Coastal Zone Management Act Consistency Determination.
- (3) Clarify that a supplemental environmental review must be prepared if “significant new circumstances or information relevant to environmental concerns or compliance have arisen since development of the project recommendation,” as referred to in Section 1153. Agencies are required to prepare a supplement to an environmental impact statement if “the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or there

are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”¹⁹ An environmental assessment must also be supplemented if these standards are met.²⁰

- (4) Clarify that the “written agreement” will include language stating that the Secretary bears the ultimate responsibility for ensuring full compliance with the procedural and substantive legal requirements applicable to projects constructed by a non-Federal sponsor, including legal liability for any non-compliance with the National Environmental Policy Act, the Federal Endangered Species Act, the Clean Water Act and other applicable laws. This requirement will provide an avenue for appropriate redress of grievances and help ensure impartial decisionmaking on the part of the Corps.
- (5) Clarify that the “written agreement” requiring a non-Federal interest to “comply with the same legal and technical requirements that would apply if the project or separable element were carried out by the Secretary,” requires full compliance with an extensive array of requirements including, but not limited to:
 - a. The National Environmental Policy Act (NEPA), including its requirement to meaningfully engage the public.
 - b. The Clean Water Act, including the substantive and analytical requirements of Clean Water Act Section 404 and the 404(b)(1) Guidelines,²¹ and requirement to obtain any needed Clean Water Act Section 401 State Water Quality Certifications.
 - c. The Federal Endangered Species Act.
 - d. The Fish and Wildlife Coordination Act.
 - e. The full suite of mitigation requirements applicable to Corps civil works projects, including the requirements to: mitigate all impacts that are more than “negligible”; include detailed and highly specific mitigation plans; carry out mitigation monitoring until ecological success is established; mitigate impacts to not less than “in-kind” conditions; comply with “the mitigation standards and policies established pursuant to the regulatory programs administered by the Secretary”; and implement mitigation prior to, or concurrently with, project construction. 33 U.S.C § 2283.
 - f. The Independent External Peer Review requirements, including the requirements regarding public notification; and the Corps’ internal peer review requirements. 33 U.S.C. § 2343.
 - g. The requirement to consider natural infrastructure alternatives, alone or in combination with traditional infrastructure, “if those alternatives are practicable” in each feasibility study for flood risk management or hurricane and storm damage risk reduction projects. WRDA 2018, Section 1149(c).
 - h. The requirement to consider nonstructural alternatives when planning flood damage reduction projects. 33 U.S.C. § 701b-11.

¹⁹ 40 C.F.R. § 1502.9(c); see *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989) (“If there remains major Federal action to occur, and the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.”)

²⁰ E.g., *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1152 (9th Cir. 1998).

²¹ As the Corps is aware, civil works projects must comply with the substantive and analytical requirements of Clean Water Act Section 404 and the 404(b)(1) Guidelines, even though the Corps does not issue itself an actual permit. 40 C.F.R. § 230.2; 33 C.F.R. § 336.1.

- i. The National Water Resources Planning Policy requirement that all federal water resources projects are to “protect[] and restor[e] the functions of natural systems and mitigat[e] any unavoidable damage to natural systems.” 42 U.S.C. 1962-3.

Section 1160. Emergency Response to Natural Disasters:

Section 1160 specifies that the “realigning” of levees is an authorized activity under the Rehabilitation and Inspection Program, often called the PL 84-99 program. 33 U.S.C. § 701n. Section 1160 builds on related changes implemented by WRRDA 2014 and WRDA 2016. WRRDA 2014 § 3029 authorized “modifications to the structure or project” and WRDA 2016 § 1176 defined “Nonstructural alternatives” under the program as “efforts to restore or protect natural resources, including streams, rivers, floodplains, wetlands, or coasts, if those efforts will reduce flood risk.”

Collectively, the changes enacted in the three most recent Water Resources Development Acts make clear that natural infrastructure approaches—efforts that restore ecosystem function and give rivers room to accommodate flood water, including levee setbacks and realignments—are both permissible and a priority under the PL 84-99 program. These approaches have multiple benefits, as they improve the reliability and resiliency of flood control works while also protecting the environment and taxpayers. The implementing guidance should assist planners in utilizing natural infrastructure approaches where appropriate, and particularly for “‘repetitive loss’ infrastructure.”²² Many of the issues outlined below should also be addressed in the Corps’ pending rulemaking on ER 500-1-1.

NWF urges that the implementation guidance for this section:

- (1) Clarify that “realigning” as used in Section 1160 includes levee setbacks, which relocate river levees further away from the river channel to give more room for the river during flood events and to increase floodplain storage. This provides important ecosystem and recreation benefits while also reducing flood heights.
- (2) Describe the types of activities that qualify as “nonstructural alternatives” under 33 U.S.C. § 701n to include the natural infrastructure activities identified in our recommendations for Section 1149 and included again below. These activities clearly fall under the WRDA 2016 definition of “efforts to restore or protect natural resources, including streams, rivers, floodplains, wetlands, or coasts, if those efforts will reduce flood risk.”

“ . . . Actions that qualify for use in a natural infrastructure alternative include, but are not limited to: (i) acquisition of land or easements, including flooding easements; (ii) removal of structures such as dams, levees, and culverts to restore natural hydrology, form, function, or ecological processes; (iii) modification of structures such as dams and levees, including through sediment diversions or levee setbacks, to restore natural hydrology, form, function, or ecological processes; (iv) reoperation of dams and reservoirs to restore or better mimic

²² Smith, David L., Scott P. Miner, Charles H. Theiling, Randall Behm, and John M. Nestler. Levee Setbacks: An Innovative, Cost-Effective, and Sustainable Solution for Improved Flood Risk Management. U.S. Army Corps of Engineers Engineer Research and Development Center. ERDC/EL SR-17-3. June 2017 (“Many existing, traditional U.S. Army Corps of Engineers ‘Corps’ levees have sustained significant damages through toe erosion, overtopping, and breaching. The repair and rehabilitation costs have been significant and — in some instances — the same levee reach has been damaged multiple times. These damages should be considered as ‘repetitive loss’ infrastructure due to the repetitive damages and rehabilitation costs to make them functional.”)

natural hydrology and flow patterns (v) restoration efforts designed to reestablish natural hydrology, form, function, or processes of rivers, streams, floodplains, wetlands, or shorelines; (vi) creation or restoration of living shorelines; (vii) removal of nonnative vegetation or reintroduction of native vegetation; and/or (viii) other actions that would reduce flood or storm hazard intensifying conditions by restoring the environment.”

- (3) Encourage planning for levee setbacks or other realignments and nonstructural approaches, including through coordination with non-Federal sponsors and federal and state agencies, **before** a flood occurs. To facilitate such pre-planning, the guidance should direct the Corps to:
 - a. Utilize the levee inspection process to also identify locations where natural infrastructure solutions could provide important benefits, with priority placed on repetitive loss infrastructure and known constriction points;
 - b. Encourage identification of natural infrastructure solutions for P.L. 84-99 program levees in flood risk reduction studies performed under existing programs such as the Flood Risk Management Program, Planning Assistance to States, Silver Jackets, and specific flood risk management project authorizations; and
 - c. Encourage identification and implementation of natural infrastructure solutions for P.L. 84-99 program levees when developing System-Wide Improvement Frameworks.

- (4) Fully incorporate realignment of flood control works and use of natural infrastructure alternatives as eligible activities within the scope of Rehabilitation Assistance and provide details on allowable activities and costs associated with such activities, including, but not limited to:
 - d. Acquisition of land or interests in land.
 - e. Removal of structures, including manufactured homes, for salvage and/or reuse purposes.
 - f. Demolition and removal of structures, including utility connections and related items.
 - g. Debris removal and debris reduction.
 - h. Removal, protection, and/or relocation of highways, roads, utilities, cemeteries, and railroads.
 - i. Construction to promote, enhance, control, or modify water flows into, out of, through, or around the realignment project area.
 - j. Nonstructural habitat restoration, to include select planting of native and desirable plant species, native species nesting site enhancements, etc.
 - k. Total or partial removal or razing of existing reaches of levee, to include removal of bank protection structures and riprap.
 - l. Protection/floodproofing of essential structures and facilities.
 - m. Supervision, administrative, and contract administration costs of other allowed expenses.

- (5) Clarify that, as with all other types of alternatives, the Corps shall document the benefits and costs of alternatives that are not repair-in-place in a manner that allows meaningful comparison with the benefits and costs of traditional infrastructure. Under 33 U.S. C. § 701n(a)(2), the Corps is to consider the benefits of protecting residential establishments, commercial establishments including inventory, and agricultural establishments including crops when preparing a cost benefit analysis. However, the Corps is not prohibited from including other benefit categories. When evaluating the benefits of levee setbacks on the Missouri River, the Corps analyzed additional categories including: (i) long term costs of repair, rehabilitation and replacement; (ii) critical facilities and infrastructure; (iii) emergency, evaluation and clean up; (iv) flood stage reduction benefits to the system; and (v) ecosystem benefits. The implementation guidance

should direct the Corps to include these categories when calculating costs and benefits. The guidance should also direct the Corps to account for lost ecosystem services as a project cost and to account for increased ecosystem services as a project benefit.

- (6) Direct the collection of data on repetitive flood loss infrastructure and on projects and structures that cause flood-related or natural resource problems, and make that information available to the public, including through the National Levee Database. This data, in combination with known constriction points, will help the Corps and the public identify locations where levee setbacks and other natural infrastructure solutions could be particularly valuable. Data on PL 84-99 rehabilitation expenses including historic expenses and cumulative costs of rehabilitation should also be included in the National Levee Database.
- (7) Direct Corps districts to notify and consult with non-Federal sponsors about opportunities for realignment and natural infrastructure alternatives, as required by WRDA 2016 which directs the Corps to “notify and consult with the non-Federal sponsor regarding the opportunity to request implementation on nonstructural alternatives to the repair or restoration of a flood control work under subsection (a).” As part of this consultation, non-Federal sponsors should be provided with as much detailed information as possible on: the benefits of levee setbacks and other natural infrastructure options; the full array of natural infrastructure alternatives to repair-in-place that are potentially covered by PL 84-99; planning resources available through an Interagency Levee Task Force, Silver Jackets, or other options; and case study examples of natural infrastructure alternatives.

Section 1168. Disposition of Projects:

Section 1168 adopts important improvements to the disposition study process, including: (i) directing the Corps to carry out disposition studies in a transparent process, including by providing opportunities for public comment and publishing final studies; (ii) requiring the Secretary to “consider modifications that would improve the overall quality of the environment in the public interest, including removal of the project or a separable element of a project” in disposition studies; and (iii) authorizing the Secretary to use existing authorities to pursue the removal of infrastructure recommended for removal in a disposition study in partnership with others.

The National Wildlife Federation strongly encourages the disposition and removal of federal water resources infrastructure that no longer serves the Federal interest because such removal creates important opportunities for highly effective, self-sustaining ecosystem restoration that benefits people and wildlife. The implementing guidance should update and revise the Interim Guidance on the Conduct of Disposition Studies²³ issued by the Corps in 2016 (the “Disposition Study Interim Guidance”) to account for the important changes established by Section 1168. The implementation guidance should also clarify the need to prepare an environmental impact statement or environmental assessment as part of the Disposition Study process, as required by the National Environmental Policy Act.

²³ USACE, Interim Guidance on the Conduct of Disposition Studies, August 22, 2016 (available at https://planning.erdc.dren.mil/toolbox/library/MemosandLetters/2016_Disposition_Memo.pdf).

NWF urges that the implementation guidance for this section:

- (1) Clarify that both draft and final disposition studies are subject to formal public notice and comment periods to ensure full transparency and facilitate public input into disposition studies which are funded 100% through federal taxpayer dollars.
- (2) Direct the posting of draft and final disposition studies, and related public comments, on the Corps' website within 10 days of completion. We recommend that all disposition studies be accessible through a single webpage to increase transparency and facilitate the public's ability to locate disposition studies and track and engage in the disposition study process.
- (3) Further increase transparency during the disposition study process by:
 - a. Making the "preliminary opinion regarding the marketability of the project" available to the public to inform the comment period on draft and final Disposition Studies. This preliminary opinion is required by Section 6 of the Disposition Study Interim Guidance which states that "Real Estate will prepare a preliminary opinion regarding the marketability of the project, in total or as separate segments to other federal agencies, state and local authorities, or private entities."
 - b. Making information prepared pursuant to the "Decision Meeting" and "Milestone"²⁴ requirements of the Disposition Study Interim Guidance available to the public to inform the public comment period on the draft and final Disposition Studies. Some districts appear to be relying on data and studies generated by single user groups during this initial decision-making stage in the disposition study process, which could inadvertently skew the decision-making process. The public should have access to this, and all other information used by the Corps, to ensure transparency and provide opportunities for meaningful public comment.
 - c. Provide an opportunity for public comment on any determination that a disposition study will not be pursued for a particular project.
- (4) Explicitly state that disposition studies "shall consider modifications that would improve the overall quality of the environment in the public interest, including removal of the project or separable element of a project" as required by Section 1168. The Disposition Study Interim Guidance should also be amended to remove any statements to the contrary.
- (5) Explicitly state that separate authorization is no longer required to pursue removal of a project or separable element of a project where, upon completion of a disposition study, the Secretary determines that the project or separable element is no longer in the Federal interest and recommends removal. Under those circumstances "the Secretary is authorized, using existing authorities, to pursue removal of the project or separable element of a project in partnership with other Federal agencies and non-Federal entities with appropriate capabilities to undertake infrastructure removal." WRDA 2018 § 1168. The Disposition Study Interim Guidance should also be amended to remove any statements to the contrary.
- (6) Amend the definition of "Disposition Studies" in Section 2 of the Disposition Study Interim Guidance to properly identify the types of projects subject to Section 1168 and the Disposition Study process. Disposition studies are authorized by Sec. 216 of the Flood Control Act of 1970, which authorizes the Secretary "to review the operation of projects the construction of which has

²⁴ Disposition Study Interim Guidance, Sections 7(a) and (b).

been completed and which were constructed by the Corps of Engineers.”²⁵ However, the 2016 Disposition Study Interim Guidance applies to a much smaller array of projects due to its inappropriate Disposition Study definition which restricts disposition studies to evaluating “a water resources development project **operated and maintained** by the Corps of Engineers.”²⁶ Section 2(b) of the Disposition Study Interim Guidance should be revised to clarify that disposition studies can be carried out for any project constructed by the Corps, not just for those projects that the Corps continues to operate and maintain.

- (7) Delete Section 3 of the Disposition Study Interim Guidance, or substantially revise Section 3 to conform to existing law which explicitly states that in carrying out a disposition study, “the Secretary shall consider modifications that would improve the overall quality of the environment in the public interest, including removal of the project or separable element of a project.”

Section 3 of the Interim Guidance does not comply with Section 1168 because it states that a separate feasibility study or major rehabilitation study is required to investigate “opportunities . . . to modify a project to serve its authorized or a new water resources development purpose, such as ecosystem restoration” and that such studies “will not be conducted using disposition study funding.” Section 3 of the Interim Guidance also appears to be in conflict with Section 216 of the 1970 Flood Control Act which allows the Corps to use the disposition study process to report to Congress on the “advisability of modifying the structures or their operation, and for improving the quality of the environment in the overall public interest.”²⁷

- (8) Amend Section 6 of the Disposition Study Interim Guidance to clarify that Real Estate recommendations must take into account project modifications that would improve the overall quality of the environment in making recommendations. The current Interim Guidance requires only that Real Estate make a recommendation regarding disposal based on “known stakeholder interests, local opportunities and the capability of potential end users.”²⁸
- (9) Amend Section 8(a)(iii) of the Disposition Study Interim Guidance to require that disposition studies consider a third category of alternatives that evaluate and assess modifications of the project to improve the overall environment, including infrastructure removal, as required by Section 1168(a).²⁹ The Implementing Guidance should provide additional guidance on developing this alternative by, at a minimum, requiring the Corps to:

²⁵ 33 U.S.C. § 549a (emphasis added).

²⁶ Disposition Study Interim Guidance § 2(b) (emphasis added) (“A specific type of study conducted under the authority of Section 216 of the Flood Control Act of 1970 (Review of Completed Projects) with the intent to determine whether a water resources development project operated and maintained by the Corps of Engineers should be deauthorized, and if the associated real property and Government-owned improvements should undergo disposal.”)

²⁷ 33 U.S.C. § 549a.

²⁸ Disposition Study Interim Guidance § 6.

²⁹ The Disposition Study Interim Guidance currently requires consideration of two categories of alternatives, “No Action” and “Deauthorize the project and dispose of the associated real property and improvements in accordance with the appropriately identified authority unless a specific disposal authority is granted based on site-specific conditions, including removal of the project improvements.” Disposition Study Interim Guidance §8(iii)(1) and (2).

- a. Consider its ecosystem restoration authorities, and determine whether the project could be modified or removed to improve the overall quality of the environment under those existing ecosystem restoration authorities.
- b. Determine whether there are federal, state, tribal, local governmental entities or private entities with an interest in acquiring the infrastructure for modification or removal purposes to improve the overall quality of the environment.
- c. Determine whether there are non-Federal sponsors interested in modifying or removing the infrastructure to improve the overall quality of the environment prior to disposal (*i.e.*, allowing the Corps to maintain ownership of the infrastructure to address liability issues while the non-Federal sponsor finances modification or removal).

(10) Clarify the need to prepare an environmental impact statement or environmental assessment as part of the Disposition Study process, as required by the National Environmental Policy Act. Disposition and removal of Corps-owned infrastructure is a major federal action significantly affecting the quality of the human environment. As a result, NEPA review is both required and essential for ensuring a full examination of potential impacts and a full range of alternatives. For example, removing a dam can be the fastest, most effective strategy for restoring a river reach and redressing some of the significant adverse impacts caused by the dam's construction and operation. However, there are also potential negative environmental impacts from dam removal (for example, release of toxic sediments) that must be examined and considered in developing, analyzing, and selecting among alternatives.

Section 1176. Preconstruction Engineering Design Demonstration Program:

Section 1176 authorizes a preconstruction engineering and design demonstration program for a single project – the Pearl River Basin, Mississippi, Federal Flood Risk Management Project, Hinds and Rankin Counties, Mississippi (the “Pearl River project”). Section 1176 would allow the Pearl River project to proceed to preconstruction engineering and design if certain criteria are met, including “a determination by the Secretary that the project is technically feasible, economically justified, and environmentally acceptable.” Section 1176 further requires, among other things, that in assessing the feasibility study and the environmental impact statement for this project “the Secretary shall follow current USACE Policy, Regulations, and Guidance, to assess potential adverse downstream impacts to the Pearl River Basin” and “the non-Federal sponsor shall design the project in a manner that addresses any potential adverse impacts or that provides mitigation in accordance with section 906 of the Water Resources Development Act of 1986 (33 U.S.C. 2283).”

The Pearl River project is strongly opposed by the conservation community, elected officials, downstream communities and the public due to the extensive harm it will cause. Congressman Bennie Thompson (D-MS-2nd), the Legislature of Louisiana (Concurrent Resolution of 2018), the Mississippi Department of Marine Resources, four Mississippi Counties, two Louisiana Parishes, three Louisiana towns and two Mississippi towns are all on record opposing the project.

The Pearl River project would dam and dredge an ecologically rich section of the Pearl River to create an artificial lake in Jackson Mississippi. The project will bury more than 1,800 acres of vital floodplain wetlands and other waters, destroy vital diverse in-stream habitat, eliminate miles of habitat for two federally protected species, expose the public and fish and wildlife to significant levels of toxic contamination, and reduce vital freshwater flows reaching the Gulf of Mexico. The U.S. Fish and Wildlife Service has acknowledged that the tentatively selected plan “is the most environmental damaging plan”

evaluated.³⁰ The Mississippi Department of Transportation has concluded that the tentatively selected plan would cause the catastrophic collapse of seven bridges and significant structural damage to two others. The Louisiana Department of Fish and Wildlife “is particularly concerned about [project-induced] changes in the amount and timing of freshwater discharge into the Mississippi Sound, where considerable oyster resources are located, and about habitat usage by migratory fish as well as rare, threatened and endangered species that occur in the Pearl River.”³¹ Many additional significant problems with the Pearl River project are documented in the extensive comments submitted by NWF and other conservation organizations on the project’s Draft Feasibility and Environmental Impact Statement.

The implementing guidance for Section 1176 should provide specific direction to ensure a comprehensive and careful assessment of the Pearl River project studies by the Secretary, provide important guidance to the non-Federal sponsor, and increase the public’s confidence in the review process and its outcome.

NWF urges that the implementation guidance for this section:

- (1) Clarify that a determination that the project is “environmentally acceptable” can be made only if the Secretary finds, among other things, that:
 - a. The studies comply with the laws and policies applicable to projects planned by the Secretary: The feasibility study, environmental impact statement (EIS), and selected alternative must comply with all applicable federal laws, including: the National Environmental Policy Act; the Clean Water Act; the Endangered Species Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Water Resources Development Act mitigation requirements; the National Water Resources Planning Policy; and all other applicable environmental laws.
 - b. The non-Federal Sponsor facilitated and carried out robust and legally adequate public engagement: The non-Federal sponsor must facilitate effective public involvement, and fully consider and account for comments submitted on the draft EIS and the final EIS. Before reaching this finding, the Secretary will assess the completeness and adequacy of the draft and final EISs that were distributed for public comment. As recognized by the Courts, “[a] public comment period is beneficial only to the extent the public has meaningful information on which to comment”³² The recently released draft EIS for this project lacked a host of critically important and legally-required information and evaluations.
 - c. The non-Federal Sponsor carried out legally compliant Independent External Peer Review: The non-Federal sponsor must comply with the requirements of 33 USC § 2343, including the requirements to provide the public with information on the timing of the Independent External Peer Review, the entity that has the contract for the IEPR review, and the names and qualifications of the IEPR panel members within seven days after establishing a panel. 33 U.S.C. § 2343(c). Despite repeated requests, this information has not been provided for the Pearl River project.
 - d. The studies fully analyze downstream impacts: The EIS and feasibility study must expand the study area to account for the full scope of potential downstream (including the coastal zones of Mississippi and Louisiana). Additional significant analysis of upstream

³⁰ U.S. Department of the Interior, Fish and Wildlife Service letter to Michael E. Goff at page 6 (August 16, 2018) (providing official comments on the DEIS).

³¹ Letter from Jack Montoucet, Secretary, Louisiana Department of Wildlife and Fisheries to Rankin Hinds Pearl River Flood Control and Drainage Control District (Aug. 28, 2018).

³² *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 708 (10th Cir. 2009).

and project area impacts must also be conducted. The EIS and feasibility study must utilize rigorous modeling (peer-reviewed in caliber and proven in methodology) and associated scientific analyses to analyze impacts to all river miles, including those below the proposed activity and within the coastal zones of Mississippi and Louisiana. Downstream assessments should analyze the full suite of direct, indirect, and cumulative impacts, including but not limited to impacts to: freshwater inputs into the Gulf of Mexico; wetlands and coastal habitats that provide vital habitat to fish and wildlife and protect communities from flood and storm damages; Important Bird Areas; existing conservation lands, including more than 125,000 acres located downstream; and impacts to multi-million dollar restoration projects planned or underway across the Central Gulf Coast.

- e. The studies include a robust alternatives analysis: The final EIS and feasibility study must examine a meaningful, and legally appropriate, array of alternatives, including natural infrastructure alternatives as required by Section 1149 of WRDA 2018, both alone and in combination with other measures. In our comments on the Pearl River project draft EIS and feasibility study, the National Wildlife Federation recommended consideration of at least the following alternatives, none of which were examined in the draft EIS:
- (1) Alternatives that utilize restoration activities to reduce flood damages in the project area while also improving the ecological health and resiliency of the Pearl River, its floodplain, and the fish and wildlife species that rely on those resources. Flood damage reduction benefits can be achieved through, among other things, restoring the Pearl River floodplain wetlands, restoring wetlands along upstream tributaries, and restoring the in-stream functions of the Pearl River and its tributaries;
 - (2) Alternatives that utilize a combination of restoration activities in conjunction with targeted buy-outs, targeted flood-proofing, and appropriate levee setbacks;
 - (3) Alternatives that utilize a combination of targeted buy-outs, targeted flood-proofing, and appropriate levee setbacks;
 - (4) Alternatives that utilize levee setbacks and floodplain restoration at highly constricted areas along the Pearl River, including the levee setbacks from RM 288 to RM 291 identified in the TSP and floodplain restoration between RM 284 and RM 290;
 - (5) Alternatives that utilize actions to address any unaddressed root causes of the 1979 Flood as identified in the report by the Comptroller General of the United States, entitled Improvements Being Made In Flood Fighting Capabilities in the Jackson, Mississippi, Area, CED-80-36 (December 18, 1979); and
 - (6) Alternatives that utilize changes to the operation of the Ross Barnett Reservoir to aid in flood damage reduction, both as a stand-alone alternative and in combination with other alternatives.
- f. The studies meaningfully respond to public comments and IEPR Panel findings: The final EIS and feasibility study must meaningfully respond to the comments on the draft EIS submitted by the Independent External Peer Review Panel required by 33 U.S.C. § 2343, other federal agencies, states, local governments, and the public. In determining whether the studies have meaningfully responded to public comment, the Secretary should assess whether additional critical studies and analyses have been conducted in response to comments, whether improved data or modeling has been used in response to comments, whether the studies select a less environmentally damaging alternative or significantly modify the tentatively selected plan to reduce impacts, and whether a legally and ecologically sound mitigation plan has been adopted.

- g. The studies include a robust and legally adequate mitigation plan that will produce ecologically successful in-kind mitigation: The final EIS and feasibility study must include a mitigation plan that satisfies the requirements of 33 U.S.C. § 2283 and fully mitigates adverse impacts, including downstream impacts. Many acres of mature hardwood forests (including 85-100 year old trees in LaFleur’s Bluff State Park and cypress/tupelo hardwoods along backwater areas such as sloughs and old river channels) will be destroyed under the tentatively selected plan. Destruction of these special habitats must be avoided. Impacts to fish and wildlife from increased water temperatures, lower dissolved oxygen levels, and/or increased salinity levels also require mitigation and must be fully accounted for in the required mitigation plan.³³ The final EIS and feasibility study must ensure in-kind mitigation for losses to bottomland hardwood forests and not less than in-kind mitigation for losses to other habitat types. 33 U.S.C. § 2283. The amount of mitigation must include sufficient acreage to offset the many decades it will take for the bottomland hardwoods to reach maturity. All mitigation should take place within the Pearl River Basin.
 - h. The selected alternative protects public health: The selected plan must protect the public from the risks of toxic exposure and resuspension of contaminated sediments.
 - i. The selected alternative causes the least amount of environmental harm: The Secretary should require that the selected plan is the one that will cause the least amount of environmental harm possible; ideally one that utilizes a combination of natural infrastructure and non-structural solutions to avoid adverse impacts.
- (2) Clarify that a determination that the project is “economically justified” can be made only if the Secretary finds, among other things, that:
- a. The economic analysis accounts for lost ecosystem services and values as a project cost: The project’s cost estimate should account for the ecosystem services and values of the wetland and river habitats lost due to construction of the project. Ecosystem services valuation should be used where appropriate to identify these costs.
 - b. The economic analysis accounts for the full costs of required hazardous waste and toxic sediment remediation: The project’s cost estimate must properly account for the extensive costs associated with the safe and effective removal, disposal, and remediation of hazardous landfills, contaminated sites, and toxic sediments that will be affected by the project.
 - c. The economic analysis accounts for the full costs of bridge replacements identified by the Mississippi Department of Transportation: The project’s cost estimate must account for the full costs of replacing the nine (9) bridges that will be affected by the project (under the tentatively selected plan). The Mississippi Department of Transportation has advised the non-Federal sponsor that the tentatively selected plan would cause the catastrophic collapse of seven bridges and significant structural damage to two others and that “all nine (9) bridges will need to be replaced and the cost to replace the nine (9) bridges should be reflected in the cost of the Pearl River Basin Federal Flood risk Management Project.”³⁴

³³ For example, the complete loss of mature riparian forests bordering large stretches of the Pearl River will eliminate the important shading benefits those forests provide, leading to potentially significant and unhealthy increases in water temperature in the newly created “lake” and downstream.

³⁴ Letter from Melinda L. McGrath, Executive Director, Mississippi Department of Transportation to the Rankin-Hinds Pear River Flood & Drainage Control District (Sept. 5, 2018).

- d. The economic analysis accounts for the full costs of implementing required mitigation and long-term monitoring of that mitigation to ensure ecological success: The project's cost estimate must properly account for the full costs of required mitigation and long-term mitigation monitoring. 33 U.S.C. § 2283. Impacts to bottomland hardwood forests must be mitigated to in-kind conditions and impacts to other habitat types must be mitigated to "not less than in-kind conditions." *Id.* Mitigation costs must include the cost for monitoring until ecological success is established. Where mitigation is undertaken to address losses to mature habitats, ecological success will not be established until the mitigation reaches maturity. As a result, mitigation for destruction of mature bottomland hardwood forests may require monitoring for 50 years or more. Mitigation for fish and wildlife impacts caused by higher water temperatures, lower levels of dissolved oxygen, increased salinity, and toxic exposure both upstream and downstream must also be included, and accounted for, in the cost of the plan.
- e. The economic analysis provides an accurate accounting of the costs of a full range of alternatives, and does not inappropriately inflate the costs of non-selected alternatives: The Secretary should ensure that the cost estimates of non-selected alternatives are not artificially inflated. For example, the draft EIS and feasibility study inflated the costs of the levee alternative by adding \$311 million in pumping station costs which raised the total cost of that alternative to \$729 million, despite previous studies which concluded that the pumps were neither necessary nor economically justified. Similarly the draft EIS rejected a nonstructural alternative due in large part to the significant cost of that plan which unnecessarily and inappropriately considered a buy-out of every single structure located in the 100 year floodplain of the project area (3,100 structures, including residential structures, commercial structures, government and public buildings, schools, and hospitals).

Section 1202. Additional Studies:

Section 1202 authorizes habitat restoration studies on the Lower Mississippi River in Missouri, Kentucky, Tennessee, Arkansas, Mississippi, and Louisiana as well as ecosystem restoration and flood risk management studies for the St. Louis Riverfront on the Meramec River Basin in Missouri and Illinois. The Lower Mississippi River study was originally authorized based on a Section 7001 proposal submitted by the Lower Mississippi River Conservation Committee (LMRCC) and The Nature Conservancy.

In addition to restoring vital habitat, the proposal submitted by the LMRCC and The Nature Conservancy envisions the Corps assisting with a water quality monitoring program on the Lower Mississippi River that would help build a long-term data set to assist federal agencies in water quality assessments. The U.S. Geological Survey and Environmental Protection Agency would be the lead agencies, while the LMRCC, Corps, and other sponsors would assist in determining specifics of the monitoring program.

NWF urges that the implementation guidance for this section:

- (1) Direct the Corps to coordinate with the LMRCC, per Section 1202(a)(2), and the non-Federal sponsor to agree on the proper scope for each of the feasibility studies.
- (2) Direct the Corps to first consider analyzing the feasibility of restoring the eight priority reaches through a single feasibility study that looks comprehensively at restoration needs and projects.
- (3) Include elements in the feasibility study that would help support the development of a water quality monitoring program.

Section 1214. Community Engagement:

Section 1214 directs the Secretary to prepare a report for Congress on “any potential disproportionate and adverse health or environmental effects of programs, policies, and activities of the Corps of Engineers related to water resources development projects on minority communities, low-income communities, rural communities, and Indian Tribes.” In preparing this report the Secretary is required to fully engage with “representatives of minority communities, low-income communities, rural communities, and Indian Tribes, as well as representatives of State and local governments, and shall ensure that sufficient meetings are held in different geographic regions of the United States to ensure that a diversity of views are obtained.”

The National Wildlife Federation recommends that the Corps develop implementation guidance for this Section. Such guidance should provide clear direction on the steps that are to be taken to effectively carry out the public outreach and engagement required by this Section. NWF further recommends that the Corps engage in significant initial outreach to “representatives of minority communities, low-income communities, rural communities, and Indian Tribes, as well as representatives of State and local governments” to gather information and recommendations to assist in the development of this guidance and the required study.

Water Resources Development Act of 2016

WRDA 2016, Section 1162. Fish and Wildlife Mitigation:

Mitigation of adverse impacts to fish and wildlife and ecological resources is a critical component of project planning and construction. The National Wildlife Federation urges the Corps to prioritize full compliance with mitigation requirements and policies. To do this, the Corps must first take all steps possible to avoid adverse environmental impacts in project planning, including by greatly expanding use of natural infrastructure and non-structural solutions. The Corps then must take all steps possible to minimize adverse impacts that cannot be avoided. Finally, the Corps must carry out compensatory mitigation to help redress the adverse environmental impacts that cannot be avoided or minimized.

The Water Resources Development Acts establish clear and important requirements to help the Corps plan and implement ecologically successful compensatory mitigation. However, a number of these key statutory mandates are not properly described in the mitigation implementing guidance creating significant problems with mitigation implementation and mitigation planning that does not comply with the law. The Corps should correct these failings and compile and integrate the numerous mitigation guidance documents into a single guidance to improve mitigation planning and comply with the law.

NWF urges the Corps to make the following changes to the various guidance documents addressing civil works mitigation:

- (1) Compile and integrate the numerous guidance documents addressing civil works mitigation into a single guidance document to assist project planners.
- (2) Correct a significant error in the mitigation guidance issued for Section 2036(a) of WRDA 2007. That guidance improperly restricts the WRDA 2007 mitigation requirements to reports submitted to Congress for authorization. This is a fundamentally incorrect interpretation of the law that improperly exempts major project studies from the mitigation standards established by Congress.

WRDA 2007 explicitly applies the civil works mitigation requirements to **any type of report** that selects a project alternative. This includes supplemental environmental impact statements. This also includes environmental impact statements that assess ongoing operations and maintenance of, and water control manuals for, already constructed projects. A more detailed discussion of the applicable law is provided below.

- (3) Revise the mitigation guidance issued for Section 1040 of WRRDA 2014 to clarify that programmatic mitigation plans may **not be used in lieu of a project specific mitigation plan unless** the programmatic plan also meets the detailed plan and other requirements established by Section 2036 of WRDA 2007. WRRDA 2014, which enacted the programmatic mitigation plan provision, was very clear on this point. It states that the Secretary is to use programmatic mitigation plans **“to guide the development of a mitigation plan under subsection (d).”** Programmatic plans may not replace the detailed plans required by WRDA 2007.
- (4) Revise the mitigation guidance to make it clear that the Corps’ regulatory program includes requirements that are not spelled out in the WRDA 2007 statutory mitigation requirements or in ER 1105-2-100. It is critical that Corps planners review and ensure compliance with both the civil works mitigation requirements and the regulatory program mitigation requirements, as required by law. The mitigation guidance currently incorrectly states that the regulatory program requirements will be met if planners follow the guidance in ER 1105-2-100.³⁵

As noted in recommendation (2) above, the current mitigation guidance for Section 2036(a) of WRDA 2007 improperly restricts the civil works mitigation requirements to reports submitted to Congress for authorization. This interpretation is incorrect because Section 2036 explicitly requires the inclusion of a specific mitigation plan in “any report” that selects a project alternative:

“After November 17, 1986, the Secretary shall not submit any proposal for the authorization of any water resources project to Congress in any report, **and shall not select a project alternative in any report**, unless such report contains (A) a recommendation with a specific plan to mitigate for damages to ecological resources, including terrestrial and aquatic resources, and fish and wildlife losses created by such project, or (B) a determination by the Secretary that such project will have negligible adverse impact on ecological resources and fish and wildlife without the implementation of mitigation measures. Specific mitigation plans shall ensure that impacts to bottomland hardwood forests are mitigated in-kind, and other habitat types are mitigated to not less than in-kind conditions, to the extent possible. If the Secretary determines that mitigation to in-kind conditions is not possible, the Secretary shall identify in the report the basis for that determination and the mitigation measures that will be implemented to meet the requirements of this section and the goals of section 2317(a)(1) of this title. In carrying out this subsection, the Secretary shall consult with appropriate Federal and non-Federal agencies.”³⁶

³⁵ According to the guidance, “Corps HQ Civil Works Planning Division and Regulatory Branch jointly determined in 2009 that upon the incorporation of the requirements of Section 2036 of WRDA 2007, as amended, the mitigation planning process outlined in ER 1105-2-100 is consistent with the standards and policies of the Regulatory program, as described in Compensatory Mitigation for Losses of Aquatic Resources, Final Rule, Federal Register, Volume 73, No. 70, Pages 19594-61065, April 10, 2008 (reference 2.e, above).”

³⁶ 33 U.S.C. § 2283(d)(1) (emphasis added).

The existing mitigation guidance cannot be reconciled with this statutory provision because the guidance states that the mitigation planning requirements apply only to reports submitted to Congress for authorization. This interpretation ignores the entire independent clause “, **and shall not select a project alternative in any report**” and gives that clause no meaning whatsoever. Under the Corps’ interpretation, the adjective “any” as a qualifier for “report” in that independent clause is also given no meaning. The Corps’ failure to give meaning to these words is contrary to the fundamental principles of statutory construction.

It is ““a cardinal principle of statutory construction”” that ““a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.””³⁷ Indeed, it is a court’s “duty ‘to give effect, if possible, to every clause and work of a statute.’”³⁸ As a result, “a statute must, if possible, be construed in such fashion that every word has some operative effect.”³⁹

Moreover, “unless otherwise defined, words [of a statute] will be interpreted as taking their ordinary, contemporary, common meaning.”⁴⁰ As a result, the adjective “any” as the qualifier in the phrase “and shall not select a project alternative in any report” means just what it says. “Any” means “any” which is variously defined as every (*i.e.*, every report that selects an alternative) or “of whatever kind” (*i.e.*, a report of whatever kind that selects an alternative).

As a result, neither the existing guidance for Section 2036(a) of WRDA 2007 nor the Corps’ reliance on that guidance comply with the plain language of the law.

Water Resources Reform and Development Act of 2014

Section 1001. Vertical Integration and Acceleration of Studies:

While NWF supports improving the efficiency of the Corps’ planning process, we are extremely concerned that the arbitrary time and financial constraints established by this section will adversely affect planning, particularly for large, complex projects. Effective and legally sufficient planning for Corps projects requires a high level of analysis to fully evaluate environmental impacts and to identify less environmentally-damaging alternatives.

The implementing guidelines should ensure that the changes established by section 1001 do not undermine the project study process. The Corps still must conduct a full, comprehensive, and legally sufficient analysis of a project’s environmental and public safety impacts; identify less damaging approaches and alternatives; and recommend only those projects that are in the national interest, comply with the National Water Resources Planning policy (WRDA 2007 § 2031, 42 USC 1962–3), and comply fully with federal environmental laws.

³⁷ *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

³⁸ *United States v. Manasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)).

³⁹ *U. S. v. Nordic Village*, 503 U.S. 30, 36 (1992).

⁴⁰ *Perrin v. United States*, 444 U.S. 37, 42 (1979).

NWF urges that the implementation guidelines for this section:

- (1) State clearly that additional time is both to be requested and to be provided, for carrying out studies that cannot be effectively completed within the 3 year default time period.
- (2) Reconfirm that § 1001 does not affect the substantive requirements of Corps project planning. The Corps still must conduct a full, comprehensive, and legally sufficient analysis of a project's environmental and public safety impacts; identify less damaging approaches and alternatives; and recommend only those projects that are in the national interest, comply with the National Water Resources Planning policy, and comply fully with federal environmental laws.
- (3) Require that the Corps actively solicit input from, and consult with, the following entities to help the Corps assess whether § 1001 is improving or undermining effective, modern, and environmentally sound project planning: (1) the federal resource agencies (*e.g.*, Fish and Wildlife Service, NOAA, Environmental Protection Agency) and relevant state agencies; (2) outside environmental and water resource management experts (*e.g.*, Association of State Wetland Managers, Association of State Floodplain Managers); (3) outside scientists, including the National Academy of Sciences; (4) conservation and environmental stakeholder groups; and (5) the public. The implementing guidelines should also require that the results of these consultations be included in each report to Congress required under this section.

Conclusion

The National Wildlife Federation appreciates the opportunity to provide comments on the implementing guidance for WRDA 2018, WRDA 2016, and WRRDA 2014. We respectfully urge the Corps to include the recommendations outlined in these comments, and we look forward to working with the Corps to fully implement these recommendations. Please do not hesitate to contact me at 415-762-8264 or sametm@nwf.org if I can provide additional information or clarifications on our recommendations.

Sincerely,



Melissa Samet
Senior Water Resources Counsel