



Comments on the Implementation Guidance for the
Water Resources Development Act of 2022
Docket No. COE-2023-0002

Submitted by

The National Wildlife Federation

March 21, 2023

Submitted through web portal at: <http://www.regulations.gov/>

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The National Wildlife Federation appreciates the opportunity to comment on implementation guidance for the Water Resources Development Act of 2022 (Division H of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023). These comments also provide recommendations for important additions and modifications to the implementation guidance for provisions enacted in the Water Resources Development Acts of 2020, 2016, 2014, and 2007.

The National Wildlife Federation (NWF) is the nation’s largest conservation education and advocacy organization with more than 7 million members and supporters, and affiliate conservation organizations in 52 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.

Introduction

The Water Resources Development Act of 2022 enacted numerous planning reforms that advance more effective and environmentally sound planning, provide critical input into Corps planning from Tribes and economically disadvantaged communities, give the Corps and Congress key tools and information to increase the resilience of water resources projects, and advance restoration of important ecosystems.

These reforms build on those enacted in the Water Resources Development Act of 2020 which helped to level the playing field for use of natural and nature-based solutions to reduce flood and storm damages. Natural and nature-based solutions make communities safer and more resilient by absorbing floodwaters, buffering storm surges, and giving rivers room to spread out without harming homes and businesses. These solutions also reduce the need for new, often expensive structural flood projects, provide an important extra line of defense when levees or other structures are required, and avoid unintended adverse impacts such as diverting floodwaters onto other communities and inducing development in high risk areas. Critically, natural and nature-based solutions also protect and restore vital fish and wildlife habitat and provide other co-benefits that can be particularly valuable for under-served communities suffering from flooding and multiple environmental assaults.

The National Wildlife Federation urges the U.S. Army Corps of Engineers (Corps) to adopt the recommendations outlined below to help ensure that federal investments in the nation’s water resources utilize the most environmentally sound and forward thinking approaches to project planning to protect communities and allow wildlife to thrive.

Water Resources Development Act of 2022

Sec. 8102—Emergency response to natural disasters

Section 8102 authorizes the Corps to utilize its emergency levee repair program to increase the size and dimensions of federally authorized flood control projects and their separable elements in order to “address major deficiencies, increase resilience, increase benefits from the reduction of damages from inundation wave action, or erosion, or implement nonstructural alternatives to the repair or restoration of the structure.” The National Wildlife Federation supports the goal of increased resilience and adaptation to climate change impacts; however, it is essential that the Corps implement Section 8102 in a manner that ensures that any alterations to existing Corps projects are technically sound, do not have adverse environmental impacts or unintended consequences; and fully consider nonstructural, natural and nature-based approaches.

The National Wildlife Federation recommends that the implementation guidance for Section 8102:

1. Clarify that the guidance is separate from, and independent of, the ongoing proposed rulemaking Natural Disaster Procedures: Preparedness, Response, and Recovery Activities of the Corps of Engineers (docket number COE-2021-0008). Section 8102 represents a significant shift in the PL 84-99 program's objectives and is not aligned with the proposed rule for which the Corps recently held a public comment period.
2. Direct the Corps to regularly report to Congress on spending under Section 8102 and to make those reports publicly available. The guidance should also provide details on the information that is to be included in those reports, which must include the reporting requirements established for the PL 84-99 program (33 U.S.C. 701n) by Section 3029 of WRDA 2014. Section 3029 of WRDA 2014 directs the Corps to report every two years on the amounts spent through PL 84-99 in the previous five years and to include in that report the project for which amounts are expended, the cost of the project work, and how the project was repaired, restored, replaced, or modified. To the best of our knowledge, the Corps has submitted just one such report to Congress covering Fiscal Years 2014-2019 (which documented the expenditure of \$1,017,274,956 on flood and coastal storm risk management projects in 45 states and insular areas across the United States).
3. Direct the Corps to work with local communities and other stakeholders on pre-disaster planning for areas where future work under Section 8102 is likely. This pre-disaster planning process should include consideration of levee realignments, natural and nature-based features, and nonstructural approaches that could be utilized to increase the resilience of the community while providing multiple benefits to communities. As an emergency response program, the focus of the PL 84-99 program has been on implementing levee repairs as quickly as possible. However, changing the design of a levee system requires design, modeling and studies in order to ensure the project will perform as intended, will not divert floodwaters onto other communities, and will not have any other unintended consequences to people, property and the environment.
4. Clarify that projects carried out under this section must comply with all applicable environmental laws and their public engagement processes, including but not limited to, the National Environmental Policy Act, Clean Water Act, and Endangered Species Act.

Sec. 8103—Shoreline and riverbank protection and restoration mission

Section 8103 authorizes the Corps to carry out projects for the protection and restoration of coastal shorelines and riverbanks, including projects that advance “the conservation and restoration of the natural functions and values of rivers and shorelines.” This section further directs that the first \$200,000 of the costs to study such projects shall be at full federal expense.

The National Wildlife Federation recommends that the implementation guidance for Section 8103:

1. Prioritize consideration and use of natural and nature-based features for Section 8103 projects, including by directing the Corps to first explore solutions that use natural and nature-based features or nonstructural measures when developing Section 8103 projects. Natural and nature-based measures help to conserve and restore the natural functions and values of rivers and shorelines, and are particularly resilient in the face of storms and floods.

Sec. 8105—Public recreational amenities in ecosystem restoration projects

Section 8105 authorizes the Secretary, at the request of the local sponsor, to study the incorporation of public recreational amenities into ecosystem restoration projects if the incorporation of such amenities would be consistent with the ecosystem restoration purposes of the project.

The National Wildlife Federation recommends that the implementation guidance for Section 8105:

1. Clarify that among other things, a recreational amenity that adversely impacts, impedes, constrains, or prevents the restoration or formation of natural processes needed to ensure long-term and self-sustaining ecosystem restoration will be inconsistent with the ecosystem restoration purposes of the project. For example, armoring a portion of a natural meandering river channel to support construction of a parking lot to allow recreational access to a river restoration site would adversely impact and impede the natural riverine processes needed to ensure long-term and self-sustaining restoration of the restoration site.

Sec. 8106—Scope of feasibility studies

Section 8106 directs the Secretary, at the request of the Non-Federal sponsor, to formulate project study alternatives to: (a) maximize net benefits from the reduction of the comprehensive flood risks resulting from all sources of flood risks (e.g., river discharges, inundation and waves from hurricanes or storms, high tides, rainfall, etc.) in a flood or storm risk reduction study; and (b) maximize the combined net benefits from the primary purpose of any type of feasibility study and for water supply or water conservation purposes.

The National Wildlife Federation recommends that the implementation guidance for Section 8106:

1. Clarify that Section 8106 directives apply to new studies, ongoing studies, and to previously authorized studies that have not yet been initiated, as Congress intended.
2. Clarify that Section 8106 does not prevent or constrain the Corps from formulating project study alternatives to meet the Section 8106 criteria in the absence of a request to do so from the Non-Federal sponsor. To the contrary, development of such alternatives is fully appropriate and warranted by the requirements of the National Environmental Policy Act and other environmental laws regardless of any request to do so by the Non-Federal sponsor. Planning flood protection projects using the Section 8106 criteria is also a best practice given the multiple flood risks a region faces to ensure that the costs, benefits, and effectiveness of different flood risk reduction measures are wholly and accurately considered. The Section 8106 comprehensive flood risk approach is also in the national interest given the significant federal resources deployed following disasters. At a minimum, every flood risk management study, whether request by the local sponsor or not, should include a residual risk analysis to provide information and transparency to communities on the risks addressed by the solutions proposed, and the residual risk faced from other types of flood hazards.
3. Emphasize the importance of integrating the consideration of sea level rise and other flood risks into the formulation of alternatives to reduce those risks both individually and cumulatively.

4. Direct establishment of a clear protocol for assessing both the long-term damages associated with multiple flood hazards and permanent inundation over time, and the benefits of different risk reduction measures in reducing those damages.
5. Initiate revision of ER 1105-2-101 (Risk Assessment for Flood Risk Management Studies) and other relevant engineering regulations to account for the Section 8106 directives.
6. Direct the Corps to advise the Non-Federal sponsor in writing about the provisions of this Section and to provide the text of Section 8106 to the Non-Federal sponsor.
7. Direct the Corps to advise the public about the provisions of Section 8106 in its official National Environmental Policy Act scoping notice for the study to include the text of Section 8106 in the scoping notice.

Sec. 8107—Water supply conservation

Section 8107 amends § 1116 of WRDA 2016 to make permanent the Corps' authority to evaluate and approve water supply conservation measures at water resources development projects in States that have experienced repeated droughts. Importantly, Section 8107 also specifies that such water supply conservation measures include the use of a natural feature or nature-based feature to reduce drought by clarifying that water supply conservation measures include those "described in section in 1116 of the Water Resources Development Act of 2016 (130 Stat. 1639)." The implementation guidance should provide a full description of these types of natural and nature-based measures to assist Corps planners in effectively implementing Section 8107.

The National Wildlife Federation recommends that the implementation guidance for Section 8107:

1. Highlight the importance of fully considering natural and nature-based measures as a water supply conservation measure when carrying out Section 8107 reviews.
2. Include the full definition of natural and nature-based measures, as defined at 32 USC 2289a, to facilitate proper implementation of Section 8107.
3. Provide examples of natural and nature-based measures that can improve water supply conservation, including such things as the protection and/or restoration of wetlands (including isolated wetlands) and streams (including headwater and intermittent streams) that can do such things as recharge groundwater and ensure ecologically sound stream flows.

Sec. 8115—Tribal and economically disadvantaged communities advisory committee

Section 8115 directs the Secretary to establish a Tribal and Economically Disadvantaged Communities Advisory Committee, in accordance with the Federal Advisory Committee Act, within 90 days of enactment. This Committee is to provide the Secretary with advice and recommendations to ensure the effective delivery of water resources development projects, programs, and other assistance to Indian Tribes and to economically disadvantaged communities located in urban and rural areas.

The National Wildlife Federation recommends that the implementation guidance for Section 8115:

1. Direct establishment of two separate Federal Advisory Committees, or two separate fully-staffed Federal Advisory Subcommittees that each has a full complement of appointed members:

- a. A Tribal Federal Advisory Committee to advise the Secretary on issues related to the effective delivery of water resources development projects, programs, and other assistance to such communities recognizing and accounting for the status of Tribes as sovereign nations, implementation of the Corps' Tribal trust responsibilities; and the unique needs of federally recognized Tribes; and
 - b. An Economically Disadvantaged Communities Federal Advisory Committee to advise on improving the effective delivery of water resources development projects, programs, and other assistance to such communities.
2. Immediately initiate the process of appointing members to the Section 8115 Federal Advisory Committee(s). As part of this effort, direct implementation of a robust outreach effort to identify potential advisory committee members, including by soliciting nominations for membership.
3. Direct the Corps' Tribal Nations Technical Center of Expertise (TNTCX) to robustly engage with Tribes and Tribal leaders to obtain recommendations and nominations for membership. As recognized on the Corps' website, "the TNTCX can engage with each of the 574 Federally recognized Native American Tribes, national and regional organizations representing Native American governments, Native American communities, and the USACE Commands serving those communities." Tribes should drive the selection of the Tribal representatives to the Federal Advisory Committee.
4. Direct the Corps to conduct robust outreach to communities of color, economically disadvantaged communities, and non-governmental social justice organizations to obtain recommendations and nominations for individuals who could effectively represent economically disadvantaged communities on the Federal Advisory Committee. Direct the Corps to consult and coordinate with the National Environmental Justice Advisory Council (NEJAC) to the Environmental Protection Agency, the White House Environmental Justice Advisory Council (WHEJAC), and the Federal Interagency Working Group on Environmental Justice (EJ IWG) to obtain recommendations and nominations for individuals who could effectively represent economically disadvantaged communities on the Federal Advisory Committee.
5. Inform the Corps that establishment of the Federal Advisory Committee(s) under this section is to be carried out using existing funding, and does not require a stand-alone appropriation, as evidenced by Congress' direction to establish the Committee(s) by March 23, 2023 (within 90 days of December 23, 2022, the date that WRDA 2022 was enacted).

Sec. 8117—Corps of Engineers support for underserved communities; outreach

Authorizes \$30 million for the Secretary to develop, support, and implement public awareness and outreach regarding the Corps' water resources development authorities and programs to potential non-Federal interests. Directs the Corps to prioritize such efforts towards economically disadvantaged communities in both urban and rural areas.

The National Wildlife Federation recommends that the implementation guidance for Section 8117:

1. Incorporate applicable public awareness and outreach recommendations:
 - a. Identified by interagency environmental justice committees (including the National Environmental Justice Advisory Council (NEJAC) to the Environmental Protection Agency, the White House Environmental Justice Advisory Council (WHEJAC), and the Federal Interagency Working Group on Environmental Justice (EJ IWG)); and
 - b. Included in the Federal Interagency Working Group on [Environmental Justice & NEPA Committee, Promising Practices for EJ Methodologies in NEPA Reviews](#) (March 2016); and [National Environmental Justice Advisory Council, Model Guidelines for Public Participation](#) (January 2013).
2. Direct robust outreach to communities of color, economically disadvantaged communities, and non-governmental social justice organizations to obtain recommendations for improving the Corps' outreach efforts (and supporting materials) to economically disadvantaged communities.
3. Direct Corps staff to account for community resource constraints and competing priorities for community leaders, staff, and members when developing and scheduling meetings, webinars, and other outreach efforts. Economically disadvantaged communities face many challenges that will affect their ability to take advantage of Corps programs, including such things as lack of planning staff and expertise and difficulty or inability to provide a non-Federal cost share.
4. Direct Corps staff to develop educational materials that utilize layperson language to explain the Corps' processes and programs. When appropriate, and upon request, the Corps should translate educational materials into the languages used in the community that will receive the materials.
5. Direct Corps staff to ensure that virtual public meetings are held on platforms that are fully accessible to all participants, including for example, the platform used to host the WRDA 2020 and WRDA 2022 implementation guidance stakeholder meetings or platforms like Zoom. The Corps should be directed to not hold virtual public meetings through Facebook or similar platforms that are not fully accessible to all participants.
6. Direct Corps staff to visit rural or isolated communities in person (when safe to do so) to provide information on Corps projects and programs, and to ensure that the use of technology to disseminate information does not replace face-to-face engagement with communities.
7. Direct Corps staff to develop procedures for: (a) identifying and integrating cultural and geographic differences into outreach efforts; (b) ensuring that notices of meetings and webinars are provided through methods and sources used by the community, including through radio, newspapers, direct mailings, electronic media, social media, community centers, places of worship, universities, colleges, vocational schools, social justice organizations, labor and other worker organizations, and public health agencies; (c) fostering community capacity to access Corps programs by providing technical assistance where needed; and (d) investing the time, cultural respect, and regard needed to build authentic relationships with economically disadvantaged communities to facilitate effective learning and engagement with Corps programs.

Sec. 8118—Pilot programs for certain communities

Section 8818 Increases the number of projects and feasibility studies that can be carried out annually under the two pilot programs established by § 118 of WRDA 2020 for small, rural, and economically disadvantaged communities. The number of studies that can be carried out under the Pilot Program for Economically Disadvantaged Communities is increased from a total of 10 studies to 10 studies each year. These studies will be carried out at full Federal expense, and shall, to the maximum extent practical, incorporate significant use of natural or nature based features or a combination of such features.

The number of projects that can be carried out under the Pilot Program for Rural and Economically Disadvantaged Communities is increased from 10 to 20. Under this program, the Corps may recommend flood or storm damage reduction projects without demonstrating that the project is justified solely by national economic development benefits provided that certain criteria are met, including that the project serves an economically disadvantaged or a rural community and is critical to the long-term life safety, economic viability, and environmental sustainability of the community.

The National Wildlife Federation believes that Section 8818 is self-explanatory and does not require implementation guidance. Critically, however, Section 118 of WRDA 2020 does need implementation guidance, as highlighted by the National Wildlife Federation and many other commenters during the comment period on the WRDA 2020 implementation guidance. The National Wildlife Federation calls on the Corps to issue implementation guidance on Section 118 that includes the detailed recommendations provided at Attachment A to these comments.

Sec. 8123—Expediting hydropower at Corps of Engineers facilities

Section 8123 directs the Secretary to assess opportunities to increase hydroelectric capacity at existing Corps projects that have existing hydroelectric facilities and to add hydropower facilities to existing Corps projects that currently do not have such facilities. This section amends 33 U.S.C. 2321b, which requires the Secretary to evaluate the potential impacts of increasing the hydropower capacity at a non-Federal hydropower facility could be carried out consistent with authorized project purposes, and to solicit input from interested stakeholders. Increasing hydropower outputs and adding new hydropower facilities can cause significant harm to river and floodplain health; in-stream flows; water quality; fish and wildlife resources; and in some cases, public safety. The implementing guidance should clarify that reviews under Section 8123 must comply with federal environmental laws and policies—and not just evaluate the impacts on a project's authorized purposes.

The National Wildlife Federation recommends that the implementation guidance for Section 8123:

1. Clarify that reviews under Section 8123 are to comply fully with federal environmental laws and policies, including the National Environmental Policy Act, Clean Water Act, Endangered Species Act, and the mitigation requirements and National Water Resources Planning Policy directives established by various Water Resources Development Acts.
2. Clarify that reviews carried out under Section 8123 must, among other required assessments, fully evaluate the direct, indirect, and cumulative impacts of proposed operational changes on the timing and amount of in-stream flows, wetland and floodplain health, estuary health, water quality, fish and wildlife, public safety, and resilience to climate change.
3. Require formal public notice and comment as part of the required stakeholder input.

Sec. 8127—Environmental dredging

Section 8127 directs the Secretary to coordinate efforts with other Federal agencies and regional and State agencies responsible for the remediation of contaminated sediments at certain authorized Corps restoration projects (Bubbly Creek IL ecosystem restoration project—Bubbly Creek flows to the Chicago River, which flows into the Illinois River before reaching the Mississippi; Columbia and Lower Willamette Rivers OR and WA navigation project; Mahoning River OH ecosystem restoration project), and with EPA to report to Congress within 180 days on efforts to remove or remediate contaminated sediments associated with those projects.

The National Wildlife Federation recommends that the implementation guidance for Section 8127:

1. Direct Corps staff to document lessons learned through the work carried out under Section 8127 to inform efforts to effectively remove or remediate contaminated sediments associated with other Corps projects—efforts that are critically important to public health and safety and to wildlife.

Sec. 8134—NEPA reporting

Section 8134 directs the Secretary to provide a publicly accessible annual report to Congress on: (a) the timeframes for completing the environmental reviews under the National Environmental Policy Act (NEPA) for water resources development projects; and (b) information on the studies and projects which relied on a categorical exclusion in lieu of an environmental review. This will provide Congress and the public with important information on the Corps' environmental review processes.

The National Wildlife Federation recommends that the implementation guidance for Section 8134 should direct the Corps to:

1. Develop a tracking system, and related agency-wide protocols for entering information into that system, to ensure effective and uniform tracking of the Section 8134 information across all Corps Districts and business lines.
2. Provide important context to Section 8134 reports by including the following information for each tracked project: the location of the project; the project type (e.g., flood risk reduction, navigation, restoration); the most recent estimate of the costs for constructing the project; where a tentatively selected or selected preferred alternative has been identified, a summary of the measures included in such alternatives and their identified environmental impacts; and a link to the latest environmental review and/or decision document confirming that the project is applicable to be covered by a categorical exclusion.

Sec. 8140—Policy and technical standards

Section 8140 requires the Secretary to revise, rescind, or certify as current, as applicable, each policy and technical standards publication applicable to the Corps' civil works programs. Ensuring that these documents are up to date will improve project planning and project compliance with current laws and policies.

The National Wildlife Federation recommends that the implementation guidance for Section 8140:

1. Direct establishment of protocols to ensure that the revisions, rescissions or certifications required by Section 8140 will happen every five years.

2. Prioritize the many required updates to the Corps' Planning Guidance Notebook, ER 1105-2-100, which was issued in 2000 and last partially updated in 2007.
3. Provide opportunities for public input into proposed revisions to ER 1105-2-100 and other publications that implicate important policies, and encourage outside expert input into modifications to technical standards as appropriate.
4. Require notification to interested stakeholders and the public when a policy or technical standard publication is revised, rescinded, or certified as current.
5. Update the Corps' website to provide a single site where all Corps policy and technical standards publications can be readily accessed and easily searched by Corps planners and the public. It is extremely difficult to locate and search these materials on the Corps current website.

Sec. 8145—Lower Mississippi River Basin demonstration program

Section 8145 directs the Secretary to establish a program to provide “environmental assistance” to non-Federal interests in the Lower Mississippi River Basin to design and construct projects for flood or coastal storm risk management or aquatic ecosystem restoration. The Section further directs the Secretary to develop, within 2 years, a comprehensive Lower Mississippi River Basin restoration plan to guide the implementation of projects under this section. The Comprehensive Plan is to give priority to projects that “will improve water quality, reduce hypoxia in the Lower Mississippi River or the Gulf of Mexico, or use a combination of structural and nonstructural measures, including alternatives that use natural or nature-based features.”

The National Wildlife Federation recommends that the implementation guidance for Section 8145:

1. Stress the Section 8145 directive requiring the Corps to give priority to projects that will use nonstructural measures, including alternatives that use natural or nature based features, when providing environmental assistance related to flood or coastal storm risk management projects under this Section. These measures and features can provide highly resilient protection against flood and storm risks while also helping to improve water quality.
2. Direct Corps staff to carry out robust outreach to Tribes, communities of color, economically disadvantaged communities, indigenous communities, non-governmental social justice organizations, and non-governmental conservation organizations to obtain input into, and comments on, the comprehensive Lower Mississippi River Basin restoration plan required by Section 8145.

Sec. 8150—Non-federal interest advisory committee

Requires the Secretary to establish a Non-Federal Interest Advisory Committee, in accordance with the Federal Advisory Committee Act to provide advice and recommendations on methods for advancing the more effective and efficient delivery of water resources development projects, programs, and other assistance.

The National Wildlife Federation recommends that the implementation guidance for Section 8150:

1. Direct the Corps to conduct robust outreach to non-governmental conservation organizations and other sectors that are to be represented on the Committee to obtain recommendations and nominations for individuals who could provide effective representation and recommendations as a member of the Federal Advisory Committee.
2. Direct the Corps to formally solicit nominations to the Federal Advisory Committee.
3. Inform the Corps that establishment of the Federal Advisory Committee under this section is to be carried out using existing funding, and does not require a stand-alone appropriation, as evidenced by Congress' direction to establish the Committee by March 23, 2023 (within 90 days of December 23, 2022, the date that WRDA 2022 was enacted).

Sec. 8152—Rehabilitation of pump stations

Expands the types of pumping plants that are eligible for the changes allowed under § 133 of WRDA 2020 to include non-Federal pump stations integral to a broader Corps flood or coastal storm risk management project. Section 133 allows the Corps to increase the capacity of Corps-built pump stations and related drainage measures, or otherwise rehabilitate those pump stations, based on a determination that the work “is feasible.” It is critical that the implementation guidance clarify that any recommendation to increase the capacity of a pump station and/or related drainage measures is subject to the same laws and policies that must be followed when evaluating any other type of flood or storm damage reduction project (i.e., any recommendation should be made only after a feasibility-level review, and not simply based on a determination that the increase is “feasible” which could be misinterpreted to only require a determination that the capacity increase is possible to do easily or conveniently). Construction and operation of facilities to increase pumping capacity and related drainage can cause significant harm to wetlands, water quality, in-stream flows, and wildlife habitat. Increasing pump capacity can also increase flood risks for communities and businesses along the waters that receive the pumping plant discharges.

The National Wildlife Federation recommends that the implementation guidance for Section 8152:

1. Explicitly clarify that the Corps may not make any recommendation to increase the capacity of a pump station and/or related drainage measures unless, and until, the Corps complies fully with the federal laws and policies applicable to the evaluation of any other type of flood or storm damage reduction project, including: the National Environmental Policy Act; Clean Water Act; Endangered Species Act; and Water Resources Development Act directives on civil works mitigation, full consideration of natural and nature-based feature alternatives, and National Water Resources Planning Policy.

Sec. 8153—Report to Congress on Corps of Engineers reservoirs

This Section directs the Secretary to expedite completion of, and make publicly available, the update to the Corps' report on Corps of Engineers' reservoirs required by Section 1046(a)(2)(B) of WRRDA 2014. This report will provide important information on the status of reservoir operating plans and the related, required environmental reviews. Modernizing operation of reservoirs provides an important opportunity for improving critically-important river flows; better protecting and restoring riverine, floodplain, and coastal habitats; increasing resilience to droughts; and reducing the emission of methane, a potent greenhouse gas.

The National Wildlife Federation recommends that the implementation guidance for Section 8153:

1. Given the already significant delay in the completion of the critically important, and long-overdue report, the implementation guidance should include a detailed schedule, with key milestones, to ensure prompt completion of the report and its required audit. The National Wildlife Federation urges the Corps to complete this report by December 2023.
2. Direct the Corps to make this report publicly available, including on a publicly accessible website, within 5 days of completion of the report.

Sec. 8219—Hydraulic evaluation of Upper Mississippi River and Illinois River

Directs the Secretary to periodically study the flow frequencies and water surface profiles for certain rivers in the Upper Mississippi River and Illinois River basins. An accurate understanding of this information is critical for public safety, ecosystem health, and proper management of the Mississippi River. Because outside experts have documented extensive problems with numerous Corps models and their ability to adequately evaluate project specific impacts, the Section 8219 assessments should be developed in consultation with, and reviewed by, outside experts.

The National Wildlife Federation recommends that the implementation guidance for section 8219:

1. Establish a timeline for regularly updating the flow frequency studies and water profiles. The National Wildlife Federation urges the Corps to initiate the first flow frequencies and water surface profiles as possible given to ensure they can be completed within the required 5-year timeline and given the significant public safety and environmental implications of this information.
2. Direct the USACE Institute for Water Resources Hydrologic Engineering Center to carry out the Section 8219 assessments in consultation with academic institutions and/or the National Academy of Sciences.
3. Require independent external peer review of the assessments carried out under Section 8219 by the National Academy of Sciences.

Sec. 8230—Assessment of coastal flooding mitigation modeling and testing capacity

Section 8230 directs the Secretary (through ERDC) to evaluate and report to Congress on the Corps' current capacity to model coastal flood mitigation systems and test the effectiveness of such systems in preventing flood damage from coastal storm surge. Accurately modeling and developing coastal flood mitigation systems is essential to public safety, the environment, and sound water resources planning. Outside experts have documented extensive problems with numerous Corps models and their ability to adequately evaluate project specific impacts. As a consequence, the Section 8230 assessment should be carried out in consultation with, and reviewed by, outside experts.

The National Wildlife Federation recommends that the implementation guidance for Section 8230:

1. Direct ERDC to promptly initiate the Section 8230 assessments.

2. Direct ERDC to consult with academic institutions and the National Academy of Sciences in carrying out the Section 8230 assessments.
3. Require independent external peer review of the Section 8230 assessments by the National Academy of Sciences.

Sec. 8341—Mississippi River Gulf Outlet, Louisiana

Section 8341 clarifies that restoration of the Mississippi River Gulf Outlet (MRGO) in Louisiana will be carried out at full federal expense. First authorized in WRDA 2007, the MRGO Ecosystem Restoration Plan is a comprehensive plan comprised of multiple projects to restore and conserve estuarine habitats surrounding New Orleans that were destroyed or degraded due to the construction of the MRGO navigation channel. These losses eliminated the natural protective wetland buffer surrounding New Orleans, losses that played a significant role in the catastrophic flooding that occurred during Hurricane Katrina. After over a decade of delay due to a cost-share dispute, Congress clarified in WRDA 2022 that it originally intended the plan and its corresponding projects to be funded at 100% federal cost.

The National Wildlife Federation believes that the Section 8341 mandate is clear and does not require implementation guidance. Should the Corps nevertheless elect to develop implementation guidance for Section 8341, the National Wildlife Federation recommends that the implementation guidance highlight the project implementation recommendations provided below.

The National Wildlife Federation urges the Corps to move forward with the MRGO Ecosystem Restoration project without further delay. Doing so is essential for restoring the marshlands destroyed by the MRGO which are so critical to revitalizing vital ecosystems in the New Orleans area to protect vulnerable communities from storm and flood impacts. In carrying out this project, the National Wildlife Federation urges the Corps to fully comply with Section 8341, other current legal requirements, prior guidance, and best practices to:

1. Clearly recognize the full scope of the legislated 100% Federal share requirement, detailing without any additional conditions the responsibility of the Corps to cover all costs associated with planning, engineering and design, construction, environmental compliance, and all other activities of this critical restoration priority.
2. Direct planners to prioritize the use of natural and nature-based features to the maximum extent practicable, including for shoreline protection, to effectively restore a self-sustaining ecosystem and provide multiple co-benefits.
3. Direct the Corps to provide meaningful community involvement, including by directing the Corps to coordinate with local stakeholders, engage communities in discussions regarding plan implementation and project design and alternatives, develop and provide educational materials that utilize layperson language to explain the Corps' processes and the public's ability to engage in those processes.
4. Clarify the federal and any non-federal roles related to acquisition, at full federal cost, of all lands or interests in lands required for the project, including any provision of funds to non-federal parties for this work under Section 8148 of WRDA 2022 or any other authority.

5. Include an accounting of all currently available funding for the MRGO Ecosystem Restoration Implementation effort, including any remaining supplemental funding that was directed towards the MRGO post-Katrina and any other funds available under the Corps' general authorities.
6. Direct inclusion of substantial additional funding for MRGO restoration and monitoring in each subsequent Corps of Engineers work plan and fiscal year budget request until the restoration is deemed to be successful based on robust monitoring.

Sec. 8343—Lower Mississippi River comprehensive management study

Section 8343 clarifies that development of the important Lower Mississippi River Comprehensive Management Study (authorized by § 213 of WRDA 2020) will be carried out at full federal expense. This large-scale study will advance smarter river management throughout the Lower Mississippi River, from Cape Girardeau, Missouri to the Gulf of Mexico. The National Wildlife Federation believes that the Section 8343 mandates are clear and do not require implementation guidance. Should the Corps nevertheless elect to develop implementation guidance for Section 8343, the National Wildlife Federation recommends that the implementation guidance highlight the study process recommendations provided below.

The National Wildlife Federation urges the Corps to advance the Lower Mississippi River Comprehensive Management Study expeditiously at full federal expense, including by moving quickly to the study's scoping phase. Prompt completion of this study is essential for: preventing further delays in coordinating river management; developing synergies among storm protection community resilience, ecosystem restoration, and protection of river-dependent commerce; and preventing untold damage from inevitable future storms. Throughout the study process, we urge the Corps to:

1. Carry out robust engagement with affected communities and ensure there are ways to incorporate community voices that are affected by river management decisions made in this region, consistent with Section 112 of WRDA 2020. Particular efforts should be made to consult with low-income communities, communities of color, and Tribes and indigenous peoples. The Army Corps should also utilize the knowledge and expertise of the Tribal and Economically Disadvantaged Communities Advisory Committee required by Section 8115 of WRDA 2022 once that Committee has been formed.
2. Incorporate climate change impacts along the Lower Mississippi River in its consideration of changing conditions pursuant to Section 4b of the 2020 implementation guidance.
3. Direct the Corps to incorporate climate change impacts along the Lower Mississippi River in its consideration of changing conditions pursuant to Section 4b of the 2020 implementation guidance
4. Identify critical water resource ecosystem restoration projects that will protect and restore the southernmost states along the Mississippi River included in Louisiana's Comprehensive Master Plan for a Sustainable Coast as provided in Section 4c of the 2020 implementation guidance; and fully evaluate how ecosystem restoration projects throughout the basin could result in improved management of the Lower Mississippi River.

5. Identify measures or actions to restore, or mitigate future impacts from flood control operations, as highlighted in Section 4d of the 2020 implementation guidance, to ensure that MR&T operations do not degrade natural resources and habitat in the southernmost waterbodies in the Mississippi River basin.
6. Prioritize consideration and use of natural and nature-based features, such as levee setbacks and floodplain restoration, outlined in Section 4e of the 2020 implementation guidance, to restore natural floodplain function along the Lower Mississippi River. Grey infrastructure management structures often transfer flood risks onto other communities, while natural infrastructure projects can protect against multiple flood types while supporting ecosystems and providing health benefits for people, ensuring more sustainable flood control into the future.

Sec. 8346—Water level management on the Upper Mississippi River and Illinois Waterway

Section 8346 authorizes and directs the Secretary to carry out routine and systemic water level drawdowns of the pools created by the locks and dams on the Upper Mississippi and Illinois Rivers to help redress the degrading influences of prolonged inundation or sedimentation from such projects, and to improve the quality and quantity of habitat available for fish and wildlife. Section 8346 further directs the Secretary to carry out these as “part of the operation and maintenance of the navigation channel projects.” This provision establishes criteria for carrying out these drawdowns to prevent adverse impacts on navigation, directs the Secretary to “use existing coordination and consultation processes to regularly coordinate and consult with other relevant Federal agencies and States regarding the planning and assessment of water level management actions implemented under this section,” and provide an opportunity for the public and interested stakeholders to comment on the proposed activities.

The legislative history for this provision reiterates that “the managers intend that such activities be routinely carried out and conducted as part of the operations and maintenance of the navigation channels as quickly as possible, and prior to the routine update of water control manuals for the covered projects.” Congressional Record-House, H8840 at H8846 December 8, 2022. Existing Corps studies and demonstration projects—that have been carefully coordinated and vetted with state resource agencies and others—show that water level management can be carried out on the Mississippi River without adversely affecting navigation, and that such management can produce significant restoration benefits at extremely low cost.¹

The National Wildlife Federation recommends that the implementation guidance for Section 8346:

1. Direct establishment of a detailed schedule, with key milestones, to ensure that:
 - a. Water level drawdowns will be carried out during the 2023 growing season, with priority given to carrying out drawdowns of the most degraded pools;
 - b. Drawdowns will be carried out routinely (e.g., yearly or every 2 years) when the Section 8346 criteria are met;
 - c. The Corps will carry out regular coordination and consultation with other relevant Federal agencies and States regarding the planning and assessment of water level management actions, as required by Section 8346; and

¹ See, e.g., [Water Level Management Opportunities for Ecosystem Restoration on the Upper Mississippi River and Illinois Waterway: An Update to the NESP Environmental Report 53; Recommendations Regarding Water Level Management to Achieve Ecological Goals in the Upper Mississippi River System.](#)

- d. The public will be given the opportunity to comment on proposed activities as required by Section 8346.
2. Inform Corps planners that implementation of routine and systemic water level drawdowns is not subject to a new start requirement.
3. Inform Corps planners that implementation of routine and systemic water level drawdowns is to be carried out using existing operations and maintenance funding and does not require a stand-alone appropriation.
4. Direct inclusion of routine and systemic water level drawdowns in each Corps of Engineers' annual work plan.
5. Direct establishment of a monitoring plan to evaluate the benefits provided by the water level drawdowns.

Sec. 8351—Missouri River interception-rearing complexes

Section 8351 the Secretary to carry out construction of interception-rearing complexes at certain locations on the Missouri River, provided any adverse impacts from such construction are identified and mitigated. Construction of these complexes are critical for the survival of the endangered pallid sturgeon. Previous WRDAs had prevented construction of these complexes despite their critical need.

The National Wildlife Federation recommends that the implementation guidance for Section 8351:

1. Given the extensive delays in constructing interception rearing complexes and their critical importance to the survival of the endangered pallid sturgeon, the implementation guidance should direct the Corps to establish a detailed schedule, with key milestones, to ensure prompt construction of the Plowboy Bend A and Pelican Bend B interception rearing complexes.
2. Direct that construction of the Section 8351 interception rearing complexes be included in each Corps of Engineers work plan until construction is completed.
3. Direct that each Corps of Engineers fiscal year budget request to Congress include a request for any needed funding needed to construct the Section 8351 interception rearing complexes until such construction is completed.

Prior Water Resources Development Acts

The National Wildlife Federation urges the Corps to amend and/or complete implementation guidance for the following provisions from the Water Resources Development Act of 2020 by adopting the implementation guidance recommendations provided in our comments on the implementation guidance for the Water Resources Development Act of 2020, COE-2021-0002. We resubmit our recommendations for these sections as Attachment A to these comments.

WRDA 2020, Sec. 112—Project consultation

Section 112 requires the Corps to update its policies on environmental justice considerations; Tribal consultation requirements, and public engagement with minority communities, economically disadvantaged communities, and Indian Tribes.

WRDA 2020, Sec. 115—Food protection projects

Section 115 clarifies that natural and nature-based measures are types nonstructural measures that must be considered under 33 U.S.C. 701b–11(a), and that the cost-share for natural and nature-based measures is the same as for nonstructural flood and storm damage reduction measures, 65% Federal and 35% non-Federal. Together, these provisions help ensure full evaluation of natural and nature-based measures and incentivize their use by placing them on a level playing field with other nonstructural measures.

WRDA 2020, Sec. 118—Pilot programs on the formulation of Corps of Engineers projects in rural communities and economically disadvantaged communities

Section 118 directs the Corps to establish two pilot programs within 180 days to evaluate opportunities to reduce flood, hurricane, and storm risks for economically disadvantaged and rural communities. This section was amended by Sec. 8818 of WRDA 2022 by increasing the number of projects that can be carried out under these pilot programs. Importantly, the Section 118 pilot programs received \$30 million in funding through the Infrastructure Investment and Jobs Act (Pub. L. 117-58, 135 STAT. 1358, NOV. 15, 2021), making it critically important to promptly issue implementation guidance for the Section 118 pilot programs.

WRDA 2020, Sec. 134—Non-federal project implementation pilot program

Section 134(a) directs the Corps to develop implementation guidance for Non-federal project implementation pilot program. This guidance is to describe, among other things, the laws and regulations that a non-Federal interest must follow in carrying out a project under the pilot program, and identify whether the Corps or the non-Federal interest bears the risk in the event that a project carried out under the pilot program fails to comply with the project authorization or legal requirements. Detailed implementation guidance is critical for ensuring that non-Federal sponsors plan and construct legally-compliant projects; and for achieving the potential benefits that could be gained by allowing qualified, efficient entities with progressive approaches to river management to plan and construct river restoration activities typically undertaken by the Corps.

WRDA 2020, Sec. 161—Studies of water resources development projects by non-federal interests

Section 161 clarifies that studies carried out by non-Federal interests under section 203 of WRDA 1986 (33 U.S.C. 2231) must comply with all of the requirements that would apply to a feasibility study undertaken by the Secretary, including all applicable environmental laws. To facilitate the development of legally-compliant studies by non-Federal interests and prevent unnecessary delays in project planning, the implementation guidance should provide a clear roadmap to the laws and procedures that must be followed, and the entities responsible for carrying out the required procedures.

The National Wildlife Federation also urges the Corps to correct the legal errors in its implementation guidance for Sec. 2036(a) of the Water Resources Development Act of 2007 (Mitigation for Fish and Wildlife and Wetland Losses) and related mitigation provisions from the Water Resources Development Acts of 2014 and 2015. We have provided our recommendations for correcting this guidance on multiple occasions, including in our comments on the implementation guidance for the Water Resources

Development Act of 2020, COE-2021-0002. Our recommendations for correcting this guidance is resubmitted in Attachment B to these comments.

WRDA 2007, Sec. 2036(a); WRDA 2014, Sec. 1040; WRDA 2016, Sec. 1162—Mitigation for Fish and Wildlife and Wetland Losses

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 Corps' implementation guidance, leading to significant problems with mitigation implementation. The National Wildlife Federation urges the Corps to correct its implementation guidance and compile and integrate the numerous mitigation guidance documents into a single document.

Conclusion

The National Wildlife Federation respectfully urges the Corps to include the recommendations outlined in these comments. We look forward to working with the Corps to fully implement these recommendations that will help ensure that federal investments in the nation's water resources utilize the most environmentally sound and forward thinking approaches to project planning to protect communities and allow wildlife to thrive. 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
Legal Director, Water Resources and Coasts

National Advocacy Center
1200 G Street, NW Suite 900
Washington, DC 20005

Attachment A

National Wildlife Federation Comments on the
Implementation Guidance for the Water Resources Development Act of 2022
Docket No. COE-2023-0002

Attachment A National Wildlife Federation Comments, COE-2023-0002

As noted at pages 15-16 of the National Wildlife Federation's comments, the Corps has not yet developed implementation guidance for key sections of the Water Resources Development Act of 2020, including: Section 112 (which the Corps contends does not require implementation guidance); Section 118 (which requires implementation guidance and received \$30 million in funding through the Infrastructure Investment and Jobs Act); Section 134 (which explicitly directs the Corps to write implementation guidance); and Section 161 (which, like Section 134 clearly requires implementation guidance). While the Corps has developed minimal implementation guidance for Section 115, that guidance cannot ensure effective implementation of Section 115.

The National Wildlife Federation urges the Corps to amend and/or complete implementation guidance for these sections by adopting the implementation guidance recommendations provided in our comments on COE-2021-0002 (implementation guidance for the Water Resources Development Act of 2020). We resubmit our recommendations for these sections below.

Water Resources Development Act of 2020

Sec. 112—Project Consultation

Section 112(b) requires the Corps to update its policies on environmental justice considerations; Section 112(c) directs the Corps to promote meaningful involvement with minority communities, economically disadvantaged communities, and Indian Tribes in carrying out water resources development projects; and Section 112(d) directs the Corps to strengthen its Tribal consultation requirements. The Corps should prioritize these essential activities and completion of the important and long overdue reports required by Section 112(a).

NWF recommends that the implementation guidance for Section 112(b):

1. Direct full compliance with—and consideration and incorporation of applicable recommendations identified through—environmental justice Executive Orders, including but not limited to: Executive Order 12898 (“Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations”), Executive Order 13748 (“Establishing a Community Solutions Council”), Executive Order 13990 (“Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis”), and Executive Order 14008 (“Tackling the Climate Crisis at Home and Abroad”).
2. Direct full consideration—and the development of procedures to ensure compliance with—relevant recommendations and principles identified by:
 - a. Other federal agencies and interagency environmental justice committees, including the National Environmental Justice Advisory Council (NEJAC) to the Environmental Protection Agency, the White House Environmental Justice Advisory Council (WHEJAC), and the Federal Interagency Working Group on Environmental Justice (EJ IWG).

- b. The [Principles of Environmental Justice](#) developed at the First National People of Color Environmental Leadership Summit (October 24-27, 1991).
 - c. The [10 Essential Public Health Services](#) developed through the Public Health National Center for Innovations and recognized by the Centers for Disease Control.
 - d. The [Community Benefits 101](#) model developed by the Partnership for Working Families.
3. Direct Corps leadership to conduct robust outreach to communities of color, economically disadvantaged communities, and non-governmental social justice organizations to obtain recommendations for improving the Corps' environmental justice considerations. Direct Corps staff to consult and coordinate with the National Environmental Justice Advisory Council (NEJAC) to the Environmental Protection Agency, the White House Environmental Justice Advisory Council (WHEJAC), and the Federal Interagency Working Group on Environmental Justice (EJ IWG) on methods and approaches for effectively implementing such outreach efforts.
 4. Direct Corps planners to invest the time, cultural respect, and regard needed to build authentic relationships with minority and economically disadvantaged communities to facilitate effective consultation, learning, and engagement. .

NWF recommends that the implementation guidance for Section 112(c):

1. Define "meaningful involvement" to mean that: (a) affected and vulnerable community residents have access and opportunities to participate in the full cycle of the decision-making process about a proposed activity that will affect their environment or health; (b) decision makers will seek out and facilitate the involvement of those potentially affected; and (c) decision makers will carefully consider the views and perspectives of community residents which can shape and influence the decision.¹
2. Direct the development of procedures to ensure that the Corps provides early and meaningful community involvement, and require that such procedures be customizable to the communities that may be impacted by a specific Corps project, program, or activity. This should include requirements to: (a) coordinate with local stakeholders to assess steps needed to effectively engage a particular community; (b) identify and integrate cultural and geographic differences into community engagement efforts; (c) provide public notices through methods and sources used by the community, including through radio, newspapers, direct mailings, electronic media, social media, canvassing, community centers, places of worship, universities, colleges, and vocational schools, senior citizens' groups, civil rights and social justice organizations, labor and other worker organizations, and public health agencies and clinics; (d) ensure that the use of social media and other technology to disseminate information does not replace face-to-face engagement with communities (when it is safe to do so); (e) engage communities in developing a public participation plan; (f) engage communities early in the decision-making process; (g) engage communities in discussions regarding possible project or permit alternatives; (h) develop and

¹ See, e.g., United States, EPA. EJ 2020 Glossary, <https://www.epa.gov/environmentaljustice/ej-2020-glossary>. Accessed 13 Apr. 2021; Virginia Code § 2.2-234, Virginia Environmental Justice Act, 2020, <https://law.lis.virginia.gov/vacode/title2.2/chapter2/section2.2-234/>.

provide educational materials that utilize layperson language to explain the Corps' processes and the public's ability to engage in and influence the Corps' activities, project decisions, and permit decisions; and (i) foster community capacity by providing technical assistance throughout public participation.

3. Direct Corps planners to visit rural or isolated communities in person (when safe to do so) to meet with community members and assess conditions on-the-ground.
4. Direct Corps planners to use the smallest scale data available to facilitate understanding of the impacts of Corps activities, civil works projects, and permits on specific communities.
5. Direct Corps planners to include in every environmental impact statement, an assessment of the potential negative environmental or public health impacts—including evaluation of measures of health inequality—on any minority communities, economically disadvantaged communities, and Indian Tribes that may be affected by the proposed project or action.
6. Direct Corps planners to account for community resource constraints, competing priorities for community members, and the time needed to review and evaluate complex planning data, when developing public hearing schedules and public comment timelines. Corps planning schedules should accommodate requests for additional time to provide comments to the maximum extent allowed by law. Review periods are often too short to accommodate competing priorities and limited capacity and resources. Public comment periods should remain open for at least 90 days and longer if possible. Public meeting notices are also often too short to allow community members to adjust their work and family schedules to attend. Notices of public meetings should be given at least 30 days before any such meeting is held.
7. Direct Corps planners to hold public meetings in locations that are safe and welcoming to all community members.² Ensure that members of the public are not required to produce a form of identification or register their names, provide other information, complete a questionnaire, or otherwise fulfill any condition precedent to attending a meeting. If an attendance list, register, questionnaire, or other similar document is utilized during meetings, ensure that it clearly states that the signing, registering, or completion of the document is voluntary.
8. Direct Corps planners to ensure that virtual public meetings are held on platforms that are fully accessible to all participants, including for example, the platform used to host the WRDA 2020 implementation guidance stakeholder meetings or platforms like Zoom. Corps planners should be directed to not hold virtual public meetings through Facebook or similar platforms that are not fully accessible to all participants because those types of platforms: discourage and limit public engagement, make commenting during the virtual hearing much more difficult (if not impossible) for members of the public who do not use those platforms, and create unacceptable opportunities for public bullying, trolling, and other inappropriate behaviors.³

² Corps planners should be prohibited from holding public meetings in conference rooms connected to jails (which have been used for Corps public meetings in Mississippi) or other similarly threatening locations.

³ The Corps recently held a virtual public meeting via Facebook on the Yazoo Backwater Pumping Plant supplemental environmental impact statement that resulted in extensive trolling and threatening messaging being directed at some participants.

9. Direct full consideration and incorporation of applicable public engagement-related recommendations included in: the [Environmental Justice for All Act \(H.R. 5986\)](#) which was introduced on February 27, 2020; Federal Interagency Working Group on Environmental Justice & NEPA Committee, *Promising Practices for EJ Methodologies in NEPA Reviews* (March 2016); and National Environmental Justice Advisory Council, *Model Guidelines for Public Participation* (January 2013).

NWF recommends that the implementation guidance for Section 112(d):

1. Direct the Corps' Tribal Nations Technical Center of Expertise (TNTCX) to robustly engage with Tribes and Tribal leaders to obtain recommendations for improving the Corps' Tribal consultation process. The TNTCX should ensure robust participation by Corps Divisions and Districts in these engagement efforts. As recognized on the Corps' website, "the TNTCX can engage with each of the 574 Federally recognized Native American Tribes, national and regional organizations representing Native American governments, Native American communities, and the USACE Commands serving those communities." Tribes should drive the development of the Corps' Tribal consultation procedures.
2. Explicitly acknowledge—and direct the development of procedures to ensure—that consultation and coordination with Tribes respect and full account for:
 - a. The principles of "Tribal sovereignty and self-governance, the Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultations with Tribal Nations", as recognized in Executive Order 13175 ("Consultation and Coordination With Indian Tribal Governments") and reaffirmed in the January 26, 2021 Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships.
 - b. The fact that Tribal Nations are the signatories to, and beneficiaries of, more than 368 treaties with the United States, and the U.S. Government is obligated to comply with treaty requirements, as recently highlighted in the Supreme Court decision *McGirt v. Oklahoma*, 591 U. S. ___, 140 S. Ct. 2452 (2020).
 - c. The fact that as sovereign and self-governing nations, the 574 Federally recognized Tribes in the United States maintain diverse and wide-ranging approaches to natural resource regulation and development, do not speak with a single voice, and do not share a single culture.
 - d. The significant historical and ongoing inequitable impacts of environmental policies and projects on Tribes and Tribal resources. The Guidance should clearly state, however, that the Corps' responsibility to account for and redress such environmental injustice is separate and distinct from the Corps' responsibilities to engage in Nation-to-Nation relationship with Tribes, respect and account for Tribal sovereignty and self-governance, and comply with Federal trust and treaty responsibilities.
3. Direct full consideration and incorporation of applicable consultation-related recommendations identified through:

- a. The Programmatic consultations carried out in response to the January 26, 2021 Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships. These consultations, which are currently underway, are seeking Tribal input on a number of important aspects of project- and policy-specific Tribal consultation processes, including such things as: (i) what does “consultation” mean; (ii) what actions trigger consultation requirements; and (iii) the appropriate time-period for consultation, including whether consultation should continue throughout the decision-making process.
 - b. Previous consultation and evaluation processes as documented in the following reports: Executive Office of the President, *2016 White House Tribal Nations Conference Progress Report, A Renewed Era of Federal-Tribal Relations* (January 2017); United States Government Accountability Office, *Tribal Consultation, Additional Federal Actions Needed for Infrastructure Projects*, GAO-19-22 (March 2019); and U.S. Army Corps of Engineers, Institute for Water Resources, *Strengthening USACE Collaboration with Tribal Nations for Water Resources Management*, 2020-R-01 27 (October 2020).
4. Prohibit a determination of Tribal consent to a proposed action unless the Tribe provides such consent in writing. Corps planners must obtain an official written determination from an affected Tribe and may not assume that a Tribe’s failure to respond to a request for consultation or comment constitutes consent to the proposed action.
5. Require the Corps to fully address objections and concerns to project proposals and permits raised by Tribes, including where necessary rejecting the proposed project or permit.
6. Direct Corps planners to account for Tribal constraints, including limited staffing and budgets and competing priorities, when developing schedules for Corps planning, construction, and operations. Corps planning schedules should accommodate Tribal requests for additional time to consult and provide comments to the maximum extent allowed by law. Review periods are often too short to accommodate competing tribal priorities and limited capacity and resources.
7. Direct establishment of processes and procedures to ensure full transparency for Tribes and Tribal governments regarding Corps laws and policies, planning, construction, operations, and permits that may affect Tribes or Tribal resources, including by: (a) establishing a single, publicly available website that provides access to all such information along with information on Tribal consultation procedures and contact information for all Corps Tribal liaisons; (b) providing full project planning schedules to Tribes for any study, project construction, or project operations that may affect Tribes and Tribal resources; (c) providing technical assistance to Tribes to facilitate their ability to fully evaluate technical planning information developed by the Corps; and (d) identifying all Corps projects, project operations, and project studies that may affect Tribes and Tribal resources.
8. Direct Corps planners to invest the time, cultural respect, and regard needed to build authentic relationships with Tribes and indigenous communities to facilitate effective consultation, learning, and engagement. This should include regular engagement (including in person, when it is safe to do so) outside of project consultations to build relationships. Whenever possible, Corps staff should consult with Tribal leaders through face-to-face meetings carried out on Tribal lands.

9. Evaluate Tribal interest in, and opportunities for developing, a Tribal Advisory Committee to provide long-term input into the Corps' Tribal consultation process.
10. Establish mandatory training on consulting with Tribal Nations for all Corps employees engaged in project planning and operations; review or approval of permits under Section 10, Section 404, and Section 408; and outreach. Such trainings should address the Federal Trust Responsibility, sovereignty, treaties and their meaning, and guidance for carrying out effective government-to-government consultations.
11. Establish a formal continuity program for Corps Tribal Liaisons and other Corps staff who interact regularly with Tribes to ensure that knowledge about general and specific Tribal issues, policies, and contacts are not lost due to Corps staffing changes.

Sec. 115—Flood Protection Projects

Section 115(a) clarifies that natural and nature-based measures are types nonstructural measures that must be considered under 33 U.S.C. 701b–11(a). Section 115(b) clarifies that the cost-share for natural and nature-based measures is the same as for nonstructural flood and storm damage reduction measures, 65% Federal and 35% non-Federal. Together, these provisions help ensure full evaluation of natural and nature-based measures and incentivize their use by placing them on a level playing field with other nonstructural measures.

Corps policy properly requires consideration of a nonstructural plan through the final array of alternatives evaluated for a flood risk management study.⁴ The important definitional change enacted through Section 115(a) means that natural and nature-based feature alternatives also must be carried through the final array of alternatives for evaluation in such studies.

Section 115(a) also directly affects the assessment of natural and nature-based features required by Section 1149(c) of America's Water Infrastructure Act of 2018 (WRDA 2018), which directs the Corps to consider the use of natural and nature-based feature alternatives, alone or in combination with structural measures, whenever those solutions "are practicable."⁵ As a result, NWF also urges the Corps to revise the implementation guidance for section 1149(c) of WRDA 2018 to ensure proper implementation of that fundamental Congressional directive.

The National Wildlife Federation recommends that the implementation guidance for Section 115:

1. Direct a robust outreach effort to inform all current nonfederal sponsors, stakeholders, and the public about: (a) the Section 115(a) requirement to fully consider the use of natural and nature-based measures in all flood and storm damage reduction studies; and (b) the important Section 115(b) cost-share change and the implications of this cost-share change for reducing the total cost of implementing natural and nature-based measures. The implementation guidance should also direct the establishment of a formal process for notifying all future non-federal sponsors and study partners about these requirements.

⁴ See, e.g., January 5, 2021 USACE Policy Directive—Comprehensive Documentation of Benefits in Decision Document.

⁵ WRDA 2020 Section 116(a) made technical corrections to WRDA 2018 Section 1149(c).

2. Define “environmentally acceptable means of reducing or preventing flood damage” to mean an activity that: (a) complies with the National Water Resources Policy; (b) complies with federal environmental laws; (c) avoids environmental damage to the maximum extent possible, minimizes any damage that cannot be avoided, and fully mitigates for any damage that cannot be avoided or minimized; (d) fully assesses and accounts for the need to reduce and alleviate environmental injustice; and (e) fully accounts for the Federal Trust Responsibility to Tribal Nations and the impacts to lands and resources under Tribal jurisdiction.
3. Describe the types of activities that qualify as natural or nature-based features to include at least the following:

Activities that qualify for use as a natural or nature-based feature include, but are not limited to: (a) acquisition of land or easements, including flooding easements; (b) removal of structures such as dams, levees, and culverts to restore natural hydrology, form, function, or ecological processes; (c) modification of structures such as dams and levees, including through sediment diversions or levee setbacks, to restore natural hydrology, form, function, or ecological processes; (d) reoperation of dams and reservoirs to restore or better mimic natural hydrology and flow patterns; (e) restoration efforts designed to reestablish natural hydrology, form, function, or processes of rivers, streams, floodplains, wetlands, or shorelines; (f) creation or restoration of living shorelines; and/or (g) removal of nonnative vegetation or reintroduction of native vegetation.

4. Clarify that Section 115(a) requires a full and careful examination of natural and nature-based measures that includes evaluation and consideration through the final array of alternatives for flood and storm risk management studies, as required for other nonstructural measures.⁶
5. Clarify that natural and nature-based features can work effectively in combination with a wide range of other measures, including: (a) other types of nonstructural 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; (b) changes to the operation of existing water resources projects through updates to water control manuals and navigation operations and maintenance plans; and (c) traditional structural infrastructure.
6. Clarify that: (a) natural and nature-based measures are presumed to be “practicable” unless it is clearly demonstrated that such measures cannot provide, or significantly contribute to, an appropriate level of protection; and (b) a natural or nature-based measure may not be rejected as impracticable simply because it may not be able to address all identified problems but in such cases must be considered in combination with other types of nonstructural approaches, operational changes, and/or traditional structural infrastructure.
7. Clarify that Section 115(a), Section 1149(c) of WRDA 2018, the Clean Water Act and other applicable environmental laws, require full consideration of natural and nature-based features 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

⁶ See, e.g., 33 U.S.C. 701b-11; January 5, 2021 USACE Policy Directive—Comprehensive Documentation of Benefits in Decision Document.

purpose of Section 115(a) 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.

8. Clarify that, as with all other types of alternatives, the benefits and costs of natural and nature-based features shall be documented in a manner that allows meaningful comparison with the benefits and costs of traditional structural measures. The guidance should direct that where ecosystem services valuation is used, it is to be used to evaluate all alternatives being considered, and is to include the value of ecosystem services lost as a project cost and the value of ecosystem services gained as a project benefit. The benefit-cost analysis should provide qualitative and, wherever possible quantitative, evaluations of: (a) critical flood and storm attenuation benefits, including such things as coastal or riverine erosion prevention, wave attenuation, wind reduction, storm surge attenuation, floodwater storage, and water storage and absorption; (b) critical co-benefits provided by natural and nature-based features, including such things as fish and wildlife habitat, biological regulation, groundwater recharge, nutrient regulation, sediment filtration, oxygenation, pathogen control, cultural and social justice benefits; and (c) any additive benefits achieved from combining natural and nature-based features with structural measures, including additional levels of storm or flood protection, increased survivability of structures, and reduced maintenance costs resulting from the natural or nature-based component.
9. Direct that the assessment of project costs of both natural and nature-based alternatives and of traditional structural infrastructure alternatives shall include: a cost line item that accounts for the value of any lost or forgone ecosystem services; and a cost line item that accounts for the costs of any needed mitigation.
10. Direct planners preparing flood and storm risk reduction studies to review, account for, and provide citations to current science and economic literature documenting the efficacy and cost effectiveness of natural and nature-based measures.
11. Clarify that compliance with Section 115 must occur immediately, while also directing the Corps to update the planning guidance notebook and other applicable engineering regulations and guidance documents to fully incorporate the requirements of Section 115. Compliance with Section 115 may not be delayed until the updates referred to in this paragraph are completed.
12. Establish a natural and nature-based measures Center of Expertise pursuant to the authority granted under 33 USC 2282a(e) to provide specialized planning expertise and enhance and supplement the capabilities of Corps Districts to plan and implement natural and nature-based alternatives.
13. Establish a process for providing comprehensive training to planning staff on how to develop and assess natural and nature-based measures, the documented effectiveness of such measures, and the cost-effectiveness of such measures. As part of this process, integrate training on natural and nature-based features into the Planning Core Curriculum.

The National Wildlife Federation also recommends that the Corps amend the implementation guidance for Section 1149(c) of America's Water Infrastructure Act of 2018 to:

1. Clarify that Section 1149(c) must be implemented in a manner that is consistent with the new requirements of WRDA 2020 Section 115 and the implementation guidance for Section 115.
2. Direct full evaluation of natural and nature-based features through the final array of alternatives for flood and storm risk management studies, as required pursuant to Section 115 of WRDA 2020 and Corps policy.
3. Clarify that Section 1149(c), Section 115 of WRDA 2020, the Clean Water Act and other applicable environmental laws, require full consideration of natural and nature-based features 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.
4. Clarify that the term “practicable” means “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes” as defined in both Corps and Environmental Protection Agency regulations. 33 CFR 335.7; 40 CFR 23.10(a).
5. Clarify that (a) natural and nature-based measures are presumed to be “practicable” unless it is clearly demonstrated that such measures cannot provide, or significantly contribute to, an appropriate level of protection; and (b) a natural or nature-based measure may not be rejected as impracticable simply because it may not be able to address all identified problems but in such cases must be considered in combination with other types of nonstructural approaches, operational changes, and/or traditional structural infrastructure.
6. Clarify that compliance with Section 1149(c) must occur immediately, while also directing the Corps to update the planning guidance notebook and other applicable engineering regulations and guidance documents to fully incorporate the requirements of Section 1149(c). Compliance with Section 1149(c) may not be delayed until the updates referred to in this paragraph are completed.

Finally, as you work to implement Section 115(a) and Section 1149(c) of WRDA 2018, the National Wildlife Federation recommends providing Corps planners with examples of natural and nature-based measures that have produced demonstrable flood and storm damage reduction benefits across the country, including:

- 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

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>).

- 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.
- In California, the Surfers' Point Managed Shoreline Retreat Project is restoring 1,800 feet of shoreline with cobble beach and vegetated sand dunes east of the mouth of the Ventura River to "provide resilience and offset risk from sea level rise and storms for 50 years" while maintaining beach access and other coastal resources. Since the project began, Surfers' Point has become Ventura County's most visited beach. Even with only one of two phases completed, the restored beach and dunes withstood 2015-2016 winter high wave conditions without damage, while other locations such as the Ventura Pier and promenade were damaged and the Pierpont neighborhood east of the project site was inundated.⁸
- In Iowa, 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.⁹ The easement purchase effort began after the historic 1993 floods.
- In New York, restoration of wetlands and lands adjacent to 19 stream corridors in Staten Island "successfully removed the scourge of regular flooding from southeastern Staten Island, while saving the City \$300 million in costs of constructing storm water sewers."¹⁰ Some 400 acres of freshwater wetland and riparian stream habitat has been restored along 11 miles of stream corridors that collectively drain about one third of Staten Island's land area. A 2018 study commissioned by the City of New York found that using "hybrid infrastructure" that combines nature, nature-based, and gray infrastructure together could save Howard Beach, Queens \$225 million in damages in a 100-year storm while also generating important ecosystem services.¹¹
- In Oregon, the Portland Bureau of Environmental Services restored 63 acres of wetland and floodplain habitat, restored 15 miles of Johnson Creek, and move structures out of high risk areas to reduce flood damages in the Johnson Creek neighborhood. In January 2012, when heavy rainfall caused Johnson Creek to rise two feet above its historic flood stage, the restored site held the floodwaters, keeping nearby homes dry and local businesses open. An ecosystem services valuation of the restored area found that the project would provide \$30 million in benefits (in 2004 dollars) over 100 years through avoided property and utility damages, avoided traffic delays, improved water and air quality, increased recreational opportunities, and healthy fish and wildlife habitat.¹²

⁸ Jean Judge et al., "Surfers' Point Managed Shoreline Retreat Project," in *Case Studies of Natural Shoreline Infrastructure in Coastal California: A Component of Identification of Natural Infrastructure Options for Adapting to Sea Level Rise (California's Fourth Climate Change Assessment)*. (The Nature Conservancy, 2017), 9-15, https://scc.ca.gov/files/2017/11/tnc_Natural-Shoreline-Case-Study_hi.pdf.

⁹ Natural Resources Conservation Service, Restoring America's Wetlands (available at https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/16/nrcs143_006638.pdf).

¹⁰ Cooper Union, Institute for Sustainable Design, *The Staten Island Bluebelt: A Study In Sustainable Water Management* (<http://cooper.edu/isd/news/waterwatch/statenisland>). This effort was started in 1990.

¹¹ The Nature Conservancy, *Urban Coastal Resilience: Valuing Nature's Role*. (2015), <https://www.nature.org/content/dam/tnc/nature/en/documents/urban-coastal-resilience.pdf>.

¹² "Johnson Creek Restoration, Portland, Oregon," Naturally Resilient Communities, accessed November 12, 2019, <http://nrcsolutions.org/johnson-creek-restoration-portland-oregon/>.

- In Texas, restoration of a 178-acre urban wetland—formerly an abandoned golf course—acted as a sponge to store 100 million gallons of water during Hurricane Harvey, protecting 150 homes in Houston’s Clear Lake community from serious flooding. This project will store up to a half billion gallons of water and protect up to 3,000 homes when it is completed.¹³
- 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 area without such floodplain and wetland protections, Tropical Storm Irene caused extensive flooding to the city of Rutland.

The National Wildlife Federation also directs the Corps’ attention to our report on [The Protective Value of Nature](#),¹⁴ and we would welcome the opportunity to share additional examples and materials on the multiple benefits provided by natural infrastructure with the Corps.

Sec. 118—Pilot Programs on the Formulation of Corps of Engineers Projects in Rural Communities and Economically Disadvantaged Communities

Section 118 directs the Corps to establish two pilot programs within 180 days to evaluate opportunities to reduce flood, hurricane, and storm risks for economically disadvantaged and rural communities. Under the Section 118(b) Pilot Program for Economically Disadvantaged Communities, the Corps to select 10 studies to be carried out at full Federal expense to address flooding, hurricane, or storm damages that have a disproportionate impact on a rural community, a minority community, or an Indian Tribe. These studies are required to incorporate significant use of natural or nature based features or a combination of such features to the maximum extent practical. Under the Section 118(c) Pilot Program for Rural and Economically Disadvantaged Communities, the Corps may make a recommendation on up to 10 flood or storm damage reduction projects without demonstrating that the project is justified solely by national economic development benefits for economically disadvantaged or rural communities whose long-term life safety, economic viability, and environmental sustainability would be threatened without the project. The Corps should prioritize implementation of the Section 118 pilot programs which provide a critical opportunity for advancing equitable outcomes by increasing the resilience of vulnerable communities.

The National Wildlife Federation recommends that the implementation guidance for Section 118:

1. Direct Corps staff to undertake robust outreach (following the guidelines established under WRDA 2020 Section 112) to inform Tribes, communities, stakeholders, and the public about these pilot programs and opportunities for applying for participation in these pilot programs.
2. Direct Corps staff to: (a) consult with the Federal Emergency Management Agency, Environmental Protection Agency, and Tribes to help identify economically disadvantaged communities that suffer from repetitive flooding (see, e.g., FEMA’s [National Risk Index](#) and EPAs

¹³ Exploration Green, 2018, <https://www.explorationgreen.org/>.

¹⁴ Glick, P., E. Powell, S. Schlesinger, J. Ritter, B.A. Stein, and A. Fuller. 2020. The Protective Value of Nature: A Review of the Effectiveness of Natural Infrastructure for Hazard Risk Reduction. Washington, DC: National Wildlife Federation (available at www.nwf.org/protective-value-of-nature).

[Environmental Justice Screening and Mapping Tool](#)); and (b) reach out directly to identified communities to explore their interest in participating in the pilot programs.

3. Direct Corps staff to follow the guidelines for ensuring meaningful community involvement developed pursuant to WRDA 2020 Section 112.
4. Direct Corps staff to provide technical assistance to communities seeking to apply for consideration under the Section 118 pilot programs.
5. Stress that the Section 118(b) pilot program requires a full and careful examination of natural and nature-based measures that includes evaluation and consideration through the final array of alternatives. Clarify that Section 115(a) of WRDA 2020, Section 1149(c) of WRDA 2018, the Clean Water Act and other applicable environmental laws also require this full and careful review.
6. To ensure compliance with the Sec. 118(b) requirement to incorporate natural features or nature-based features to the “maximum extent practicable” clarify that: (a) natural and nature-based measures are presumed to be “practicable” unless it is clearly demonstrated that such measures cannot provide, or significantly contribute to, an appropriate level of protection; and (b) a natural or nature-based measure may not be rejected as impracticable simply because it may not be able to address all identified problems but in such cases must be considered in combination with other types of nonstructural approaches, operational changes, and/or traditional structural infrastructure.
7. Clarify that Section 115(a) of WRDA 2020, Section 1149(c) of WRDA 2018, the Clean Water Act and other applicable environmental laws require a full and careful examination of natural and nature-based measures and other nonstructural measures, including through the final array of alternatives, in both Section 118 pilot programs irrespective of any stated interest or objection that may be raised by the non-Federal sponsor.
8. Describe the types of activities that qualify as natural or nature-based features to include at least the following:

Activities that qualify for use as a natural or nature-based feature include, but are not limited to: (a) acquisition of land or easements, including flooding easements; (b) removal of structures such as dams, levees, and culverts to restore natural hydrology, form, function, or ecological processes; (c) modification of structures such as dams and levees, including through sediment diversions or levee setbacks, to restore natural hydrology, form, function, or ecological processes; (d) reoperation of dams and reservoirs to restore or better mimic natural hydrology and flow patterns; (e) restoration efforts designed to reestablish natural hydrology, form, function, or processes of rivers, streams, floodplains, wetlands, or shorelines; (f) creation or restoration of living shorelines; and/or (g) removal of nonnative vegetation or reintroduction of native vegetation.

9. Clarify that natural and nature-based features can work effectively in combination with a wide range of other measures, including: (a) other types of nonstructural 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; (b) changes to the operation of existing water resources projects through updates to water control manuals and navigation operations and maintenance plans; and (c) traditional structural infrastructure.

10. Clarify that, as with all other types of alternatives, the benefits and costs of natural and nature-based features shall be documented in a manner that allows meaningful comparison with the benefits and costs of traditional structural measures. The guidance should direct that where ecosystem services valuation is used, it is to be used to evaluate all alternatives being considered, and is to include the value of ecosystem services lost as a project cost and the value of ecosystem services gained as a project benefit. The benefit-cost analysis should provide qualitative and, wherever possible quantitative, evaluations of: (a) critical flood and storm attenuation benefits, including such things as coastal or riverine erosion prevention, wave attenuation, wind reduction, storm surge attenuation, floodwater storage, and water storage and absorption; (b) critical co-benefits provided by natural and nature-based features, including such things as fish and wildlife habitat, biological regulation, groundwater recharge, nutrient regulation, sediment filtration, oxygenation, pathogen control, cultural and social justice benefits; and (c) any additive benefits achieved from combining natural and nature-based features with structural measures, including additional levels of storm or flood protection, increased survivability of structures, and reduced maintenance costs resulting from the natural or nature-based component.
11. Direct that the assessment of project costs of both natural and nature-based alternatives and of traditional structural infrastructure alternatives shall include: a cost line item that accounts for the value of any lost or forgone ecosystem services; and a cost line item that accounts for the costs of any needed mitigation.
12. Direct planners preparing feasibility studies under the Section 118 pilot programs to review, account for, and provide citations to current science and economic literature documenting the efficacy and cost effectiveness of natural and nature-based measures.

Sec. 134—Non-Federal Project Implementation Pilot Program

Section 134(a) requires the Corps to develop implementation guidance for this pilot program that: describes the laws and regulations that a non-Federal interest must follow in carrying out a project under the pilot program; and identifies whether the Corps or the non-Federal interest bears the risk in the event that a project carried out under the pilot program fails to comply with the project authorization or legal requirements. Detailed implementation guidance is critical for ensuring that non-Federal sponsors plan and construct legally-compliant projects; and for achieving the potential benefits that could be gained by allowing qualified, efficient entities with progressive approaches to river management to plan and construct river restoration activities typically undertaken by the Corps.

NWF recommends that the implementation guidance for Section 134(a):

1. Include each of the implementation guidance recommendations provided in our comments on Section 161 of WRDA 2020, below.
2. Clarify that a supplemental environmental review must be prepared if the non-Federal sponsor or the Corps make “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.”¹⁵

3. In addition to clarifying the extensive mitigation requirements that must be followed during project planning (as set forth at 33 USC 2283, and included in our recommendations under Section 161, below), clarify that when constructing a water resources project under this pilot program, the non-Federal sponsor: (1) must implement required mitigation prior to, or concurrently with, project construction; (2) must monitor the required mitigation until ecological success is established; (3) must implement the required contingency plan for taking corrective actions in cases where monitoring demonstrates that the mitigation measures are not achieving ecological success; (4) must mitigate all impacts that are more than “negligible”; and (5) must mitigate impacts to bottomland hardwood forests to in-kind conditions and impacts to other habitat types to not less than in-kind conditions.
4. Clarify that the Secretary bears the ultimate responsibility for ensuring full compliance with the procedural and substantive legal requirements applicable to projects planned and constructed by a non-Federal sponsor, including legal liability for any: (a) non-compliance with the National Environmental Policy Act, the Federal Endangered Species Act, the Clean Water Act, or other applicable laws; and (b) failure to carry out required mitigation that meets the requirements of 33 USC 2283 and the Clean Water Act.

Sec. 161—Studies of Water Resources Development Projects by Non-Federal Interests

Section 161 clarifies that studies carried out by non-Federal interests under section 203 of WRDA 1986 (33 U.S.C. 2231) must comply with all of the requirements that would apply to a feasibility study undertaken by the Secretary, including all applicable environmental laws. To facilitate the development of legally-compliant studies by non-Federal interests and prevent unnecessary delays in project planning, the implementation guidance should provide a clear roadmap to the laws and procedures that must be followed, and the entities responsible for carrying out the required procedures.

It is clear that a detailed and explicit roadmap will benefit the public, the Corps, other federal agencies, and the public. For example, for years, NWF and our partners have received conflicting information on the required procedures for the non-Federal sponsor study of the Pearl River Basin, Mississippi Federal Flood Risk Management Project in Mississippi. Conflicting information has come from the non-Federal sponsor, the Vicksburg District of the Corps, Corps Headquarters staff, and the Office of the Assistant Secretary. The U.S. Environmental Protection Agency (EPA) and U.S. Fish and Wildlife Service (FWS) also appear uncertain of the proper procedures. EPA determined that it did not have to provide comments on the draft EIS released by the non-Federal sponsor because the project had not been “federalized.” FWS, on the other hand, prepared a Fish and Wildlife Coordination Act Report and a Biological Opinion based on the non-Federal sponsor’s draft EIS, though neither document was released to the public until well after the close of the public comment period on the non-Federal sponsor draft. To date, no independent external peer review has been carried out on the non-Federal sponsor study, despite the clear applicability of the independent external peer review requirements.

¹⁵ *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.”) An environmental assessment must also be supplemented if these standards are met. E.g., *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1152 (9th Cir. 1998).

The confusion surrounding the process being used had—and continues to have—significant implications for public engagement and input. The public comment period on the non-Federal sponsor’s draft EIS was poorly noticed, the draft study documents were extremely difficult to access, and key analyses and information were missing from the draft. Both the non-Federal sponsor and the Vicksburg District refused to provide requested technical information to help the public understand the project study, despite the requirements of 33 USC 2342, with the Vicksburg District arguing that they were not required to provide the requested information because the project was not a federal project. The public also was unable to ascertain whether the non-Federal sponsor’s comment period was the “official” comment period required by the National Environmental Policy Act and thus, the only comment period that would be provided on the draft EIS. The process for finalizing the EIS remains unclear. Some of these many problems are documented in the letters included at Attachment A to these comments.

The National Wildlife Federation strongly recommends that the implementation guidance direct the non-Federal sponsor to carry out a formal public notice and comment period on an interim draft EIS and interim draft feasibility study to inform the non-Federal sponsor study process, while also clarifying that the Corps will provide a second opportunity to comment on the completed draft EIS during the formal public notice and comment period required by NEPA. This would be consistent with the approach outlined in ER 1105-2-100.¹⁶

NWF urges that the implementation guidance required by Section 161:

1. Explicitly reconfirm 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.
2. Clarify the entities responsible for each step of the study process (i.e., the Corps or the non-Federal sponsor) including the entity responsible for: (a) initiating the formal scoping process; (b) initiating and carrying out the public notice and comment period required by NEPA on the completed draft EIS; (c) ensuring robust notification of, and robust public engagement in, public comment periods; (d) responding to public comments and concerns, including concerns raised outside of an official public comment period; (e) responding to requests for information from the public and federal agencies, including requests for planning and other project data pursuant to 33 USC 2342, which requires the Corps to provide such data “as soon as practicable” after it is generated; and (f) when required by 33 USC 2343, ensuring review of the project study by an independent external peer review panel.
3. Clarify the point in the study process at which: (a) EPA is to carry out its legally-required review of the draft and final NEPA documents, and of the project’s compliance with the Clean Water Act; (b) the Fish and Wildlife Service is to provide the Fish and Wildlife Coordination Act Report and engage in any required consultation under the Endangered Species Act; (c) independent external peer review is to be carried out under 33 USC 2343, if such review is required; and (d) the Corps will carry out the internal peer review processes required as part of the Corps’ planning process (see, e.g., EC 1165-2-217).

¹⁶ 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).

4. Clarify the entity that bears the risk if the required laws and procedures are not followed (i.e., the Corps or the non-Federal sponsor).
5. Clarify the steps to be followed if the non-Federal sponsor lacks the resources to conduct required technical analyses, and the steps to be followed if the public raises significant concerns with the technical analyses prepared by the non-Federal sponsor.
6. Direct the non-Federal sponsor to carry out a formal public notice and comment period on an interim draft EIS and interim draft feasibility study to inform the non-Federal sponsor study process, while also clarifying that the Corps will provide a second opportunity to comment on the completed draft EIS during the formal public notice and comment period required by NEPA.
7. Highlight key laws and policies that must be followed, 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. The guidance should require 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. The guidance should reconfirm that a public comment period on an incomplete environmental impact statement will not satisfy NEPA, and will preclude a finding by the Secretary that the non-Federal sponsor's study complies with the law (as required by 33 USC 2231(b)). All analyses required under NEPA must be included in a draft environmental impact statement 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."¹⁷
 - b. The Clean Water Act, including the substantive and analytical requirements of Clean Water Act Section 404 and the 404(b)(1) Guidelines,¹⁸ and requirement to obtain any needed Clean Water Act Section 401 State Water Quality Certification(s). The implementation guidance should require inclusion of at least a draft 404(b)(1) Guidelines analysis with the draft environmental impact statement to facilitate meaningful public comment.
 - c. The Federal Endangered Species Act. The implementation guidance should clarify that Endangered Species Act-required documents are to be provided to the public along with the draft environmental impact statement to facilitate meaningful public comment.
 - d. The Fish and Wildlife Coordination Act. The implementation guidance should 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 to facilitate meaningful public comment.

¹⁷ *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 708 (10th Cir. 2009).

¹⁸ 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 (33 U.S.C. 2283), 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.
 - f. The Independent External Peer Review requirements (including the public notification requirements); and the Corps’ internal peer review requirements. 33 U.S.C. 2343. The implementation guidance should 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 to facilitate meaningful public comment.
 - g. The requirement to fully consider natural and nature-based feature alternatives and other nonstructural alternatives when planning flood damage reduction projects; and the requirement to consider practicable natural and nature-based feature alternatives, alone or in combination with traditional infrastructure in each flood risk management and hurricane and storm damage risk reduction feasibility study. 33 U.S.C. 701b-11; WRDA 2020, Section 115; WRDA 2018, Section 1149(c) as amended.
 - h. The requirements of the National Water Resources Planning Policy which, among other things, require that all federal water resources projects “protect[and restor[e] the functions of natural systems and mitigat[e] any unavoidable damage to natural systems.” 42 USC 1962-3.
8. Clarify that non-Federal interests, like the Corps, must provide planning and design data on the Internet and upon request. 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.*
 9. Strongly encourage the non-Federal sponsor to undertake early coordination with the Corps, the Environmental Protection Agency, the U.S. Fish and Wildlife Service and/or the National Oceanic and Atmospheric Administration as applicable, and state resource agencies.
 10. 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 implementation 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 USC 2343, and whether the statutory and other requirements for such reviews are being complied with;
 - d. Whether the draft environmental impact statement 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.
11. Clarify that the Corps will take full 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:

“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.”¹⁹

12. Prohibit the use of emergency procedures for implementing NEPA in the development of studies prepared by non-Federal sponsors under this section.
13. 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.

¹⁹ 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).

14. 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 Policy Act, the Endangered Species Act, the Clean Water Act and other applicable laws.

Attachment B

National Wildlife Federation Comments on the
Implementation Guidance for the Water Resources Development Act of 2022
Docket No. COE-2023-0002

Attachment B National Wildlife Federation Comments, COE-2023-0002

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 Corps' implementation guidance, leading to significant problems with mitigation implementation.

As noted at pages 16-17 of our comments, the National Wildlife Federation urges the Corps to correct its implementation guidance for compensatory mitigation by adopting the recommendations provided in our comments on COE-2021-0002 (implementation guidance for the Water Resources Development Act of 2020). We resubmit our recommendations for these sections below.

Water Resources Development Act Mitigation Provisions

Mitigation for Fish and Wildlife and Wetland Losses--WRDA 2016 (Sec. 1162), WRDA 2014 (Sec. 1040), WRDA 2007 (Sec. 2036(a))

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 Corps' implementation guidance, leading to significant problems with mitigation implementation. The National Wildlife Federation urges the Corps to correct its implementation guidance and compile and integrate the numerous mitigation guidance documents into a single document.

One of the key flaws in the mitigation guidance is that the WRDA 2007 Section 2036(a) guidance improperly restricts compliance with the civil works mitigation requirements to reports submitted to Congress for authorization (see below for a discussion of the applicable law). The Corps has relied on this guidance to refuse to implement mitigation for significant ecosystem-wide impacts caused by project operations, even after new environmental reviews acknowledge that the operating plans will cause significant harm to aquatic resources for decades to come.

For example, the Corps claimed that the WRDA 2007 mandatory mitigation requirements did not apply to its 2017 supplemental environmental impact statement (SEIS) for the Middle Mississippi River Regulating Works Project, because "it is not a report being prepared for authorization by Congress."¹ That SEIS acknowledged that continuation of the project would cause significant environmental harm, including the loss of at least "1,100 acres (8%) of the remaining unstructured main channel border habitat" which would add to the already significant loss of 34.85% of this habitat in the Middle Mississippi River. As also acknowledged in the SEIS: (a) unstructured main channel border habitat closely resembles some of the historic habitats of the Middle Mississippi River; (b) unstructured main channel border habitat is critical to many species, including fish, amphibians, crustaceans, waterfowl, shorebirds and mammals; and (c) the continued loss of unstructured main channel border habitat from the project "is expected to have a significant adverse effect on the [Middle Mississippi River] fish community."

¹ Final Supplement I to the Final Environmental Impact Statement for the Mississippi River Between The Ohio And Missouri Rivers (Regulating Works) (May 2017), Appendix H, at H-581.

The Corps also failed to require mitigation in the 2016 environmental impact statement for the Apalachicola-Chattahoochee-Flint River System water control manual update even though that study acknowledged that the new water control manual would cause “substantially adverse” effects on riverine fish and aquatic resources in reaches of the Chattahoochee River, and impacts ranging from “slightly adverse” to “substantially adverse” on the phosphorous, nitrogen and dissolved oxygen content in the Chattahoochee River, all of which affect water quality and species health.² In its response to comments highlighting the failure to comply with the statutory mitigation requirements, the Corps contended that it had complied with all applicable laws and policies.

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 compliance with the civil works 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 Congressionally-mandated mitigation standards and requirements. WRDA 2007 explicitly applies the civil works mitigation requirements to **any type of report** that selects a project alternative. Applicable reports include, but are not limited to, environmental impact statements and supplemental environmental impact statements for: authorized but unconstructed projects, partially constructed projects, operation and maintenance of already constructed projects, and water control manual updates for already constructed projects.
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 clarify that, as a matter of law, civil works mitigation must comply with both the civil works mitigation requirements established by the Water Resources Development Acts and the regulatory program mitigation requirements (including 40 CFR §§ 230.91-230.98). Also clarify that the Corps’ detailed regulatory program mitigation requirements are not currently spelled out in Section 2036 of WRDA 2007, the implementation guidance for Section 2036 of WRDA 2007, or in ER 1105-2-100. The mitigation guidance currently incorrectly states that the regulatory program requirements will be met if planners follow the guidance in ER 1105-2-100.³

² USACE, Final Environmental Impact Statement Update of the Water Control Manual for the Apalachicola-Chattahoochee-Flint River Basin in Alabama, Florida, and Georgia and a Water Supply Storage Assessment, December 2016.

³ 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

As discussed above, the current 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(a) 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.”⁴

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.”⁵ Indeed, it is a court’s “duty ‘to give effect, if possible, to every clause and work of a statute.’”⁶ As a result, “a statute must, if possible, be construed in such fashion that every word has some operative effect.”⁷ Moreover, “unless otherwise defined, words [of a statute] will be interpreted as taking their ordinary, contemporary, common meaning.”⁸ 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).

Notably, Congress has defined the reports that are submitted to Congress for authorization as “feasibility reports” (33 USC 2282(a)(4)) but deliberately chose not to use the term “feasibility report” to trigger the

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).”

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

⁵ *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

⁶ *United States v. Manasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)).

⁷ *U. S. v. Nordic Village*, 503 U.S. 30, 36 (1992).

⁸ *Perrin v. United States*, 444 U.S. 37, 42 (1979).

statutory mitigation requirements. The legislative history for Section 2036(a) of WRDA 2007 also clearly supports application of the WRDA 2007 mitigation mandates to any type of report that selects a project alternative. The Congressional Record of the Conference Report Debate states:

The increased mitigation requirements apply to all new studies and **any other project that must be reevaluated for any reason.**⁹

A colloquy between Senators Feingold, Boxer, and Reid makes this same point:

Mr. FEINGOLD. . . .The Senate provision applies the new mitigation standards to projects that the Corps of Engineers has determined **must be reevaluated for other reasons.** . . . I ask my colleagues to concur with the importance of retaining these key elements of mitigation reform contained in section 2008(c) and (e).

Mrs. BOXER. I concur that these are fundamental elements of meaningful mitigation reform and concur that it is the committee's intent to retain these elements and that we will strenuously support them in the conference.

Mr. REID. I support the understanding reached by the chairman and the Senator from Wisconsin.¹⁰

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.

⁹ Congressional Record, Water Resources Development Act of 2007—Conference Report, September 24, 2007 at [S119817](#) (emphasis added).

¹⁰ Congressional Record—Senate, Water Resources Development Act of 2007, May 15, 2007 at [S6122](#) (emphasis added).