



Via: Regulations.gov

August 2, 2022

Ms. Stacey M. Jensen
Assistant for Regulatory and Tribal Affairs
Office of the Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

RE: Docket No. COE-2022-0006: Request for Input on Civil Works Implementation of the Principles, Requirements, and Guidelines, 87 Fed. Reg. 33756 (06/03/2022)

Dear Ms. Jensen:

On behalf of the National Waterways Conference (NWC), we respectfully submit comments in response to the Federal Register notice published on June 3, 2022, seeking input on the appropriate content of a future rulemaking to implement the Principles, Requirements and Guidelines (PR&G) to ensure consistency with the intent and purpose of PR&G. (Docket No. COE-2022-0006).

NWC was established in 1960 and is dedicated to creating a greater understanding of the widespread public benefits of our Nation's water resources infrastructure. We represent the broad spectrum of water resources stakeholders across all U.S. Army Corps of Engineers (USACE or Corps) business lines, including flood control associations, levee boards, waterways shippers and carriers, industry and regional associations, hydropower producers, port authorities, shipyards, dredging contractors, regional water supply districts, farmers, engineering consultants, and state and local governments. Our members include nonfederal sponsors of USACE Civil Works projects, and are engaged in partnership arrangements in ongoing feasibility studies, construction, and operation and maintenance activities. To that end, NWC members have a direct stake in the outcome of this proceeding.

BLUF: As the Assistant Secretary of the Army for Civil Works (ASACW) and the Corps undertake this proceeding to implement the PR&G as part of its effort to modernize the Civil Works program, it is essential to remember at the heart of the Corps' planning process is a local community seeking to address a critical water resources challenge. That nonfederal sponsor

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seeks to engage and collaborate with its Federal USACE partner to solve that issue, backed up by a significant financial commitment, through study, construction and long-term operation and maintenance. In that regard, we welcome this opportunity to update the Corps planning program, to implement a greater degree of flexibility for the nonfederal sponsor, while ensuring a clear, concise, and workable framework to guide the development of these essential projects.

Before addressing the specific questions set forth in the Federal Register notice, it would be helpful to review the background of the PR&G to help frame the discussion going forward.

1983 PRINCIPLES AND GUIDELINES

The Corps formulates and evaluates studies for major water resources projects under the 1983 Economic and Environmental Principles for Water and Related Land Resources Implementation Studies, known as the Principles and Guidelines, or the P&G. Intended to establish consistent and replicable planning criteria, the P&G provide that the “Federal objective” for project planning is to contribute to national economic development, referred to as N-E-D, consistent with protecting the environment.

Under the P&G, there are four accounts to evaluate alternatives:

- The NED, which looks to the economic value of the national output of goods and services
- Environmental quality (EQ), which looks at non-monetary effects on ecological, cultural and aesthetic resources
- Regional economic development (RED) – looks at income, employment, output and population
- Other social effects (OSE) – considers such things as community impact, health and safety, displacement, and energy conservation

The P&G states that the NED is the only required account and that other information that will have a material bearing on decision-making should be included. The Corps’ Engineering Circular, implementing the P&G, states, “Display of the national economic development and environmental quality accounts is required. Display of the regional economic development and other social effects accounts is discretionary,” and further that every effort should be made to be responsive to state and local concerns in addition to national concerns. The planning

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guidelines also provide for how to evaluate alternatives and how to establish the NED for various Corps business lines.

The P&G provides that a discount rate is to be used to convert future monetary values to present values. It is set annually using data from the Department of the Treasury, and it is currently 2.75%.

WRDA 2007

The Water Resources Development Act of 2007 (WRDA 2007) directed the Corps to update the 1983 P&G, contemplating planning founded upon multiple national objectives: economic, environmental, and social well-being, including a public safety objective. Additionally, WRDA 2007 emphasizes a watershed approach to planning, recognizing the importance of collaborative planning and implementation.

Section 2031 of WRDA 2007 states that:

(a) It is the policy of the United States that all water resources projects should reflect national priorities, encourage economic development, and protect the environment by—

- 1) seeking to maximize sustainable economic development;
- 2) seeking to avoid the unwise use of floodplains and flood-prone areas and minimizing adverse impacts and vulnerabilities in any case in which a floodplain or flood-prone area must be used; and
- 3) protecting and restoring the functions of natural systems and mitigating any unavoidable damage to natural systems.¹

In 2008, the Corps started a process to update the P&G, which was then taken over by the Council on Environmental Quality.

Recommendation: The ASACW and the Corps correctly state in the power-point presentation used during the public webinars that “public benefits” encompass environmental, economic

¹ 42 U.S.C. §§ 1962-63.

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and social goals, and that no hierarchy exists among the three goals. This is an accurate representation of what Congress intended in WRDA 2007.²

The Corps, in any forthcoming notice of proposed rulemaking, must reaffirm Congressional intent and summarily reject any suggestions to the contrary. Assertions that Congress intended the Corps to stop projects, with a no-build alternative being the default position, or that Congress intended to “flip planning on its head” such that construction is a last resort, or that Congress intended to elevate environmental benefits over economic benefits, are without merit, and moreover, are absurd on their face.

Similarly, assertions that any benefits accruing from mitigation ought not be calculated undermine the integrity of a balanced approach to water resources development and long-term maintenance.

The Corps Civil Works program appropriately reflects the national interest in water resources, and must provide for a thorough analysis of all alternatives, recognizing the critical role of non-federal sponsors in this process.

PRINCIPLES, REQUIREMENTS AND GUIDELINES

CEQ issued its final Principles and Requirements³ and draft Implementing Guidelines⁴ in 2013. Numerous substantive deficiencies and procedural failures were identified and the Corps was prohibited from implementing them until recently, when Congress directed the Corps to develop its agency-specific implementing guidelines.

It is important to be reminded of those concerns so that they can be addressed during the course of the current proceeding as the ASACW and the Corps develop a proposed rulemaking.

The National Research Council’s Water Science and Technology Board (WSTB or Board) reviewed CEQ’s proposed principles, including holding public hearings to receive input, and

² U.S. Army Corps of Engineers, Modernize Civil Works Federal Register Notice Overview Virtual Meeting (June 22, 2022) (available at <https://api.army.mil/e2/c/downloads/2022/06/22/2e55b417/modernize-civil-works-frn-overview-meeting-22-june-2022.pdf>).

³ Council on Environmental Quality, Principles and Requirements for Federal Investment in Water Resources (2013), https://obamawhitehouse.archives.gov/sites/default/files/final_principles_and_requirements_march_2013.pdf.

⁴ Council on Environmental Quality, Interagency Guidelines (2013), https://obamawhitehouse.archives.gov/sites/default/files/draft_interagency_guidelines_march_2013.pdf.

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found several fundamental flaws. The Board's report, A Review of the Proposed Revisions to the Federal Principles and Guidelines Water Resources Planning Document, issued in 2012, states:

*"An effort to modernize the P&G document so that it reflects contemporary planning methods and principles, and today's societal and economic priorities, is timely. However, the 2009 proposed revisions lack clarity and consistency in several respects. One weakness is that the distinctions and relations among "objectives", "principles", and "standards" are not clear. The 2009 proposed revisions also exhibit ambiguity in identifying federal agencies, programs, studies, and projects to which they will be applied. Another weakness is that the planning principles and steps presented in the document are not fully consistent and lack sufficient coherence in defining a process for planning or implementation. For these reasons, detailed advice on specific planning procedures at this point would be premature. As CEQ proceeds with further revisions to the P&G document, clarification and specification in these areas will be necessary for the document to be of value to CEQ and the federal agencies that will use the document in decision making."*⁵

The report then made several specific recommendations to correct the identified deficiencies.

Regrettably, CEQ failed to address those flaws in the final iterations of the P&R and Implementing Guidelines. In practical terms, this means that the PR&G:

- went far beyond what Congress intended in WRDA 2007, by elevating environmental considerations over economic and human uses, rather than establishing a balanced approach to the planning, development and management of water resources,
- would adopt a very subjective process, such that planning recommendations would not be predictable, consistent and replicable, but would be in the eye of the beholder and subject to political whims.
- would impact virtually every federal action that has a nexus to water, covering "activities" and not simply "projects,"

⁵ National Research Council, A Review of the Proposed Revisions to the Federal Principles and Guidelines Water Resources Planning Document (2012), <https://nap.nationalacademies.org/catalog/13071/a-review-of-the-proposed-revisions-to-the-federal-principles-and-guidelines-water-resources-planning-document>.

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- would have had a crippling effect on water management activities (including water supply and hydropower),
- would result in increased costs and regulations, resulting in significant burdens on project sponsors and beneficiaries, and
- would hamstring water management activities – notably droughts and floods.

Recommendation: As the ASACW and the Corps promulgate a proposed rule, the deficiencies identified by the WSTB in its report must be addressed, such that a proposed rule would be able to establish a clear, concise and workable planning framework by which the Corps and its nonfederal sponsor partners are able to develop critical water resources projects.

EFFORTS BY NONFEDERAL SPONSORS PUT A RENEWED FOCUS ON BCR AND MULTIPLE BENEFITS

The USACE Civil Works Mission is to “Deliver vital engineering solutions, in collaboration with our partners, to secure our Nation, energize our economy, and reduce disaster risk.” Integral to fulfilling this mission is the partnership with nonfederal sponsors.

As described earlier, the Corps planning process is quite complex and detailed. In recent years, there’s been growing frustration by nonfederal sponsors who seek increased flexibility and the ability to develop or modify their projects to reap multiple benefits. (Additional information is included in, but not limited to, the Army memorandum dated January 5, 2021, providing interim direction to the Corps project planning process ⁶, referenced in the June 3rd Federal Register notice). In addition, there is a growing awareness that communities who cannot compete with other projects are left aside and not able to secure authorization and funding needed to enhance their safety and security.

The following examples are set forth for illustrative purposes, to highlight various challenges faced by nonfederal sponsors, and are intended to help guide the deliberative process as the Corps works to draft a rule and update its planning documents.

- The Sacramento Area Flood Control Agency (SAFCA), with support from the State of California, has been working to obtain authority to widen the Yolo Bypass, which was originally built in 1917. The Yolo Bypass was constructed as a single-purpose federal

⁶ Memorandum from R.D. James, Assistant Sec’y of the Army, Civil Works to the Commanding Gen., U.S. Army Corps of Engineers (Jan. 5, 2021) (available at https://planning.erdc.dren.mil/toolbox/library/MemosandLetters/ComprehensiveDocumentationofBenefitsinDecisionDocument_5January2021.pdf).

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flood facility which has evolved into a multipurpose system that deals with issues such as flood control, water supply, ecosystem restoration, drainage and agricultural enhancements. The Corps recently conducted a feasibility study on the widening project but was unable to justify a federal interest because the current cost-benefit analysis only looks at estimated flood damages, rather than the multipurpose benefits of a systemwide approach.

A review of the lessons learned throughout the study process offers some suggestions for improvement, including better quantification and demonstration of all benefits accruing from these projects; improved quantification of multi-purpose benefits as well as improved quantification of urban flood protection benefits, taking into consideration such things as benefits to economically distressed areas; and better utilizing non-federal sponsors' resources, capabilities, and knowledge.

- The Norfolk Coastal Storm Risk Management Study Chief's Report includes structural, nonstructural, and natural and nature-based solutions to reduce storm damages in the event of coastal storms, while accounting for sea level change. The process highlighted the difficulty in quantifying green infrastructure, and some of those elements will be left to the nonfederal sponsor to implement. It's clear that additional research is needed in order to justify the inclusion of some options in a federal project.
- Review of a couple projects for the Harris County Flood Control District in Houston demonstrates another challenge. The county is home to 4 million people and Brays Bayou and Hunting Bayou are both flood control projects. While they are very similar projects, Brays enjoys a BCR of 7 to 1 at the 3.375 % discount rate, or 3.5 to 1 at OMB's 7% discount rate, and has received construction funding on regular basis. By comparison, Hunting Bayou has a BCR of 1.01 at OMB's discount rate. The fundamental difference is the value of the real estate. In addition, the poverty rates in Hunting are nearly double those in Brays and its median income is half. The District had been urging consideration of the number of homes and structures protected, rather than simply economic benefits, in order to get funding for Hunting. While those attempts were not successful, fortunately, Hunting received funding from Hurricane Harvey disaster relief funds so that project can commence.

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- A similar challenge was faced in California's Sutter Basin for the West Feather River Levee Project, with a debate centered upon whether the BCR for NED or the locally preferred plan (LPP) should be used for budgeting purposes. OMB's acknowledged unwritten policies forced the Corps to rank the project for funding based on the LPP rather than the NED, even though the portions of the projects that require federal expenditures are the NED portions, and the LLP and NED are viewed as separable elements. Ultimately this project had to deauthorize the LPP to receive funding and a new start in a work plan.
- There are also opportunities to incorporate multiple benefits in ongoing maintenance activities. The Little River Drainage District (LRDD) in Southeast Missouri has taken a proactive approach to long-term project management by partnering with the Missouri Department of Conservation (MDC) to maximize the environmental benefits by planting native and warm season grasses that provide increased wildlife habitat, superior erosion control, and cost effective/environmentally-friendly yearly maintenance by utilizing fire rather than mechanical mowing. At this point, those additional benefits are not captured in the BCR, but certainly could be to streamline project implementation and offset mitigation requirements.

SPECIFIC QUESTIONS

1. As we modify the Corps' planning process, what should definitely stay, what should definitely change?

The planning notebook and related guidance need to be streamlined, made more straightforward, and easily implementable at the district level. As described above, the planning framework must be concise and predictable, yet provide a degree of flexibility to allow nonfederal sponsors the ability to address local concerns and conditions as well as incorporate multiple benefits into the project.

Fundamentally, a new rule must fix the economic analysis. The current economic analysis has significant flaws that need to be addressed. Specifically:

- The current analysis is based on a Hydrologic Period of Record that is no longer representative of future events due to climate change.

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USACE uses the Hydrologic Period of Record to assign a frequency to storms of various sizes that are then used in its calculation of damages prevented by a proposed project. In many areas of the country, including urban and inland areas, the hydrologic period of record no longer represents what is expected to occur in the future. Effects of climate change are unique to each region across the United States. In particular, the last few decades are completely different than the earlier period of record and seem to be accelerating towards even more extreme situations.

Since the current methodology utilizes the historic Hydrologic Period of Record, which no longer represents the expected future events, it underestimates the number of larger events and undervalues the benefits from a project. Recent risk analyses of various projects conducted by the Corps conclude that if climate change is not considered, the future proposed flood risk reduction improvements will be inadequate well before the end of their design lifespan. An adjustment needs to be made to the current process to better account for the expected hydrologic changes.

- The NED benefits are primarily based on property values and are representative of neither the true economic benefits of USACE projects to the nation, nor the true federal costs avoided by preventing a disaster.

Historically, the Corps used to calculate additional categories as part of their NED calculations. Over the years some of these categories have been dropped out for various reasons. As a result, the current NED calculations are overwhelmingly driven by property values. This immediately caused environmental justice issues. In addition, it does not represent true damages prevented by USACE projects.

For example, the Federal Government spends a significant amount in post-recovery recovery efforts. In addition to the funding to reconstruct the flood system, homes and businesses, other recovery funds include funding for required health, mental health and social services. There is also a significant environmental clean-up and restoration. In today's economy, any disaster in any part of the country, has a negative impact on the national economy. These types of costs avoided should be included as federal flood damage costs avoided in the benefit calculations under NED.

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Data show that communities that have higher levels of flood protection, regardless of their property values, have more opportunities for healthy economic development, which then contributes to the national economic development. Additionally, there is evidence that a healthy ecosystem also contributes to a healthy economy. Instead of considering economic, social, and environmental as separate categories, to compete against each other, they all should be included as part of the NED calculation.

A better approach to address the environmental justice concerns arising from the use of property value would be to include a life safety benefit. This information is already included in studies as an estimate of lives lost if a project is not constructed. This calculation could be enhanced and included in the NED calculation as a monetary value. OMB guidance permits this and other agencies (i.e. FEMA, EPA, Food and Drug Administration, U.S. DOT including FAA, etc.) use this in their calculations of benefits.

- The current Incremental Analysis requirements are causing incomplete projects to be constructed as it is difficult to justify the last increment(s).

By way of example, when USACE originally constructed projects protecting the urban areas in much of the country, they would design a system to protect the urban area against a Standard Project Flood (SPF). A Standard Project Flood was defined as the volume of streamflow expected to result from the most severe combination of meteorological and hydrologic conditions which are reasonably characteristic of the geographic region involved, excluding extremely rare combinations.

Now that the Corps is having to reconstruct the systems protecting the urban areas to bring them up to the latest accepted standards, they have to go back and use the current planning process to reassess the original systems. The current planning process requires USACE to analyze the system in increments and only select the increments with rising B/C ratios, and not recommend the last increments, even if they have positive B/C ratios. This results in the Corps only partially reconstructing these original SPF systems, as it is difficult to justify the last increments because the base benefits have been assigned to the previous increments.

This incremental approach, if applied without a watershed perspective, significantly undercounts benefits accruing from a project, often leads away from system-wide solutions and results in gaps in our ability to protect critical urban areas.

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Simply put, once a Congressionally authorized project is commenced, the full benefits upon which the project was authorized and supported for construction will not be realized until it is completed. The total benefits that the project was authorized under will be available once the project is complete. Therefore, any incremental analysis is not germane as the project will not function as intended through its authorization and then funding that is provided until complete.

2. Which Corps missions, programs and investments should apply the PR&G?

The PR&G should be applicable to the planning program. It should not be expanded to Regulatory or Section 408. Both of those activities already provide for a thorough review. Adding on additional review would be redundant, duplicative, and unduly burdensome, with no increased benefit.

3. How broad should the scope be (in terms of area, purpose, uncertainty, level of detail, engagement, systems approach) considering limited time and budget?

The PR&G should be applicable to the planning program. As such, the Planning Notebook and related documents should be modified to provide for a workable framework, with flexibility that can be adaptable and implementable at the district level.

4. How should the planning process address uncertainties?

With respect to uncertainties that arise during the planning process around scope of design and corresponding costs, there seems to be an inherent challenge: if sufficient costs are not included during the study phase, a project may reach the 902 limit during PED or construction. Conversely, inclusion of uncertain or speculative costs may lower the BCR to a point where a project faces difficulties with obtaining either or both a Chief's report and funding. As described elsewhere, better quantification of benefits may result in an improved ability to estimate costs.

With respect to project alternatives, better measurement of risk, as described more fully above in the discussion relating to the need to update the hydrologic period of record, would allow for a more thorough assessment of alternative, lives and property saved, and federal monetary exposure.

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5. How should the Corps “equally” consider total benefits?

We support efforts that are ongoing to evaluate and quantify benefits beyond the scope of the traditional benefit cost ratio used in project formation, and to capture multiple benefits that can be yielded by these projects. This includes better quantification and demonstration of all benefits accruing from these projects; improved quantification of multi-purpose benefits, as well as improved quantification of flood protection benefits, including in economically distressed areas. A particular challenge in this area is that the BCR considers the value of real estate in the proposed project area. That measure is a clear detriment to regions with lower property values and clearly, in view of this Administration’s emphasis on equity and environmental justice, points to the need for a more focused response to flood risks in disadvantaged communities. An alternative approach could be to consider the number of homes, structures, and most significantly, lives at stake, rather than simply economic benefits. Consideration of life-safety should be paramount, derived from the Corps’ focus on risk-informed decision making, rather than a straight economic analysis.

It is worth noting that a requirement to equally consider or maximize all benefits could be a red herring and undermine the planning process by setting up unachievable goals and imposing additional financial obligations on the nonfederal sponsor. Additionally, it is unclear how OMB will make funding decisions with enhanced project benefits. Would OMB decline to fund single purpose projects? Conversely, would too many benefits dilute the federal interest, and unwittingly give OMB an opportunity to choke federal participation in all water projects? These are serious concerns that should be weighed. Perhaps a more prudent approach would be to encourage and provide the ability to consider multiple benefits where practicable but not impose unwieldy mandates.

6. How should the Corps approach tradeoffs among objectives measured in monetary, non-monetary and non-quantitative terms?

The process for formulating projects must, at its foundation, be predictable, replicable and consistent, rather than subjective. There needs to be some degree of certainty before federal dollars will flow. To that end, the Corps must employ mechanisms to allow for meaningful comparisons and analysis. An inability to measure and compare qualitative and quantitative benefits will result in subjective reviews, perhaps producing alternatives that won’t be eligible for authorization and/or funding. Moreover, this could push many important project elements to the nonfederal sponsor, in effect tilting the cost share obligations.

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As the internal process to develop the proposed rule moves forward, and the Corps grapples with how to analyze alternatives when there is a combination of monetized and non-monetized benefits, input from the latest research, including from the Nature-Based Solutions initiative, for example, may be instructive in determining how those benefits can be “racked and stacked” to rationally enable project formulation and most importantly, project recommendation and selection.

7. Are there other agency ASPs we should model?

As described above, several agencies, including FEMA, EPA, FDA and U.S. DOT, consider life safety in calculating benefits, which may be instructive as the Corps develops its ASPs.

The Department of the Interior’s ASPs provide for measuring ecosystem services. That might be somewhat helpful but it must be noted that document is very narrow and does not address flood risk management projects or benefits, a primary mission area for the Corps. In its ASPs, the Corps must develop detailed and specific guidance on the full range of benefits accruing from flood risk management projects.

8. What must happen outside of ASP development for this revision to be effective?

As the Corps considers a planning structure to account for multiple benefits, input from OMB could be helpful, as described in paragraph 5 above.

In addition, direction from Army and USACE leadership would help address any concerns at the district level and remove the traditional stovepipe implementation of guidance.

On behalf of NWC, we thank you for the opportunity to provide comments and we look forward to further collaboration as the proposed rule moves forward. If you have any questions, please do not hesitate to reach out.

Sincerely,



Julie A. Ufner
President and CEO