



Comments on the Implementation Guidance for the  
Water Resources Development Act of 2020  
Docket No. COE-2021-0002

Submitted by

The National Wildlife Federation

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Attachment A: Conservation Organization letters highlighting problems with a non-Federal sponsor study process that support our Section 134 and Section 161 implementation guidance recommendations.

The National Wildlife Federation appreciates the opportunity to comment on implementation guidance for the Water Resources Development Act of 2020. These comments also provide recommendations for important modifications to the implementation guidance for provisions enacted in the Water Resources Development Acts of 2018, 2016, 2014, and 2007.

The National Wildlife Federation (NWF) is the nation's largest conservation education and advocacy organization with more than 6.3 million members and supporters, and affiliate conservation organizations in 53 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 2020 enacted a suite of planning reforms that collectively provide the tools and authorities needed to ensure that Corps planning addresses the nation's most pressing water resources needs, prioritizes solutions for underserved communities, and improves the resilience of the nation's rivers, streams, floodplains and wetlands. These planning reforms elevate consideration of nature's potential to improve our nation's resilience, including by leveling 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 2020

### **Sec. 110—Implementation of Water Resources Principles and Requirements**

Section 110 directs the Corps to issue final agency procedures for the Principles, Requirements, and Guidelines (PR&G) within 180 days and to provide regular updates to those procedures. In developing and updating these procedures, the Corps must provide robust opportunities for public engagement and input, including a formal public notice and comment period. The PR&G elevate consideration of nature's potential to prevent and address problems, which is a preferred approach where possible because it provides other vital co-benefits for communities, protects fish and wildlife habitat, and avoids unintended adverse impacts such as diverting floodwaters onto other communities and inducing development in high risk areas. Effective implementation of the PR&G will produce smarter, more resilient, and more environmentally protective water resources projects.

The National Wildlife Federation believes that Section 110 provides clear direction on the development of the final agency procedures. As a result, the Corps can, and should, move directly to implementing Section 110 without the need to first develop implementation guidance. Should the Corps nevertheless elect to develop implementation guidance, NWF recommends that the implementation guidance:

1. Clarify that the Corps shall solicit early input from federal resource agencies, outside experts, the conservation community, Corps stakeholders, and the public. This shall include, but not be limited to, formal public notice and comment.
2. Clarify that the final agency procedures are to adopt clear criteria to drive development and selection of plans that: (a) satisfy the Congressionally established National Water Resources Planning Policy; (b) advance national priorities including increasing resilience to more frequent and intense floods, storms, and droughts; (c) increase equitable outcomes, including by prioritizing the correction of environmental injustice; (d) take all steps possible to avoid environmental harm and minimize any harm that cannot be avoided; and (e) account for lost ecosystem services as a project cost. The final agency procedures should stress that complying with these criteria will facilitate compliance with the Clean Water Act (which requires use of the least environmentally damaging practicable alternative), the National Environmental Policy Act, and the nation's other critically important environmental laws.
3. Clarify that the Corps will carefully coordinate the development of the final agency procedures with the Council on Environmental Quality.
4. Clarify that the Corps will be required to comply with the final agency procedures and PR&G immediately upon completion of the final agency procedures.
5. Direct that upon completion of the final agency procedures, the Corps shall update the planning guidance notebook and other applicable engineering regulations and guidance documents to fully incorporate the final agency procedures, the PR&G, and the many other changes in law and policy that have been enacted since the last updates to these documents. Also restate that full compliance with the final agency procedures, PR&G, and other applicable laws and procedures is required immediately, and may not be delayed until completion of the updates required under this paragraph.

### **Sec. 111—Resiliency Planning Assistance**

Section 111 directs the Corps to prioritize resiliency planning assistance to economically disadvantaged communities and communities subject to repetitive flooding (via 33 U.S.C. 709a), and emphasizes the need for the Corps to provide technical assistance to non-Federal interests for greater resiliency planning. This provision prioritizes critically important resiliency planning assistance to communities most in need.

NWF recommends that the implementation guidance for Section 111:

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 the Section 111 directive and opportunities for obtaining resiliency planning assistance.
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 [Environmental Justice Screening and Mapping Tool](#)); and (b) reach out directly to identified communities to explore their interest in obtaining resiliency planning assistance.

3. Direct Corps staff to consider a communities’ ability to pay in establishing the cost to a community for obtaining resiliency planning assistance.
4. Direct that the provision of resiliency planning is to include robust assessment and consideration of the use of natural and nature-based measures to reduce flood and storm risks while also providing multiple co-benefits.
5. Direct consideration of at least following types of benefits from natural and nature-based measures when providing resiliency planning assistance: (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.

### 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.<sup>1</sup>
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

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<sup>1</sup> 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/>.

communities in discussions regarding possible project or permit alternatives; (h) develop and 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.<sup>2</sup> 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.<sup>3</sup>

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<sup>2</sup> 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.

<sup>3</sup> 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. 113—Review of Resiliency Assessments

Section 113 requires the Corps to update existing planning guidance documents and regulations on the assessment of the effects of sea level rise or inland flooding on future water resources development projects based on the best available, peer-reviewed science, in coordination with Federal and state agencies within 180 days. It also reiterates the Corps' discretion to consider benefits accrued over time as a result of sea level rise, and when requested by the non-Federal interest, requires the Secretary to consider whether the need for the project is predicated upon or exacerbated by conditions related to sea level rise. The Corps should prioritize this update to its sea level planning guidance, which is fundamental to developing and operating effective and resilient projects that are located in, or affect, coastal areas.

NWF recommends that the implementation guidance for Section 113:

1. Clarify that "other relevant entities" that the Corps must coordinate with include institutions of higher learning and non-governmental organizations with climate science expertise.
2. Ensure opportunities for public notice and comment on the updated guidance documents and regulations.

### 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.<sup>4</sup> 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.

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

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.”<sup>5</sup> 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.

NWF 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.
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.<sup>6</sup>

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

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

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 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.

NWF 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, NWF 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%.<sup>7</sup>
- 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.<sup>8</sup>
- 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.<sup>9</sup> 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."<sup>10</sup> 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

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<sup>7</sup> 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>).

<sup>8</sup> 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](https://scc.ca.gov/files/2017/11/tnc_Natural-Shoreline-Case-Study_hi.pdf).

<sup>9</sup> Natural Resources Conservation Service, Restoring America's Wetlands (available at [https://www.nrcs.usda.gov/Internet/FSE\\_DOCUMENTS/16/nrcs143\\_006638.pdf](https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/16/nrcs143_006638.pdf)).

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

save Howard Beach, Queens \$225 million in damages in a 100-year storm while also generating important ecosystem services.<sup>11</sup>

- 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.<sup>12</sup>
- 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.<sup>13</sup>
- 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](#),<sup>14</sup> and we would welcome the opportunity to share additional examples and materials on the multiple benefits provided by natural infrastructure with the Corps.

### Sec. 116—Feasibility Studies; Review of Natural and Nature-Based Features

Section 116 requires each feasibility study for a flood or storm damage reduction project to include a summary of: (1) any natural or nature-based feature alternatives considered, including their long-term costs and benefits; and (2) if such alternatives are not included in the recommended plan, an explanation of why they were not included in the recommended plan. Section 116 provides an important tool for ensuring meaningful consideration of natural and nature-based measures, as required by law. However, to achieve this fundamental purpose, the required summary must clearly document the steps taken and evaluations carried out to assess the rejected natural or nature-based alternative.

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<sup>11</sup> 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>.

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

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

<sup>14</sup> 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](http://www.nwf.org/protective-value-of-nature)).

NWF recommends that the implementation guidance require that the Section 116 summary:

1. Clearly describe the level of analysis given to the rejected natural or nature-based alternatives, that at a minimum includes: (a) the point in the planning process at which the alternative(s) was eliminated from consideration; (b) whether modeling was done to assess the potential flood damage reduction benefits that could have been achieved by the rejected alternative(s); (c) whether a benefit-cost analysis was prepared for the rejected alternative(s) and if so whether it assessed the cost of providing the same or a different level of protection than the selected alternative (e.g., areal extent of protection, number of structures protected, level of flood protection provided); and (d) the difference in the costs associated with long-term maintenance and major rehabilitation between the rejected alternative(s) and the selected alternative.
2. Clearly describe the flood damage reduction benefits that could have been achieved by the rejected natural or nature-based alternative(s), including: (a) the acres of land that could have been protected; (b) the number of homes, businesses, and other structures that could have been protected; and (c) the public infrastructure that could have been protected (e.g., hospitals, schools, community centers, roads, bridges, etc.).
3. Clearly describe both the quantified and unquantified co-benefits that could have been obtained through use of the rejected natural or nature-based alternative(s), including benefits for wildlife, water quality, recreation, quality of life, and addressing environmental injustice.
4. Clearly describe the contribution that the rejected natural or nature-based alternative(s) would have made towards increasing resilience to climate change impacts, storing carbon, or otherwise minimizing greenhouse gas emissions as compared to the selected alternative.
5. Provide the estimated cost of the rejected natural or nature-based alternative(s).
6. Clearly describe why the natural or nature-based alternative(s) was not selected.

### Sec. 117—Federal Interest Determination

Section 117 directs that the Corps: (a) shall first determine the Federal interest in carrying out the study and projects that may be proposed in the study when preparing a feasibility report for a study that will benefit an economically disadvantaged community, if requested to do so by the non-Federal interest; (b) may do the same for up to 3 studies in each fiscal year that will benefit other communities; and (c) in certain circumstances, shall issue a report to non-Federal interests in economically disadvantaged communities on how they could modify a project request to ensure that the project is in the Federal interest. NWF supports the advancement of studies to investigate water resources solutions for economically disadvantaged communities.

It is important, however, that the implementation guidance carefully distinguish between a determination of a federal interest in carrying out a project study or type of project, and a determination of a federal interest in carrying out a specific project alternative. The Corps must have the benefit of the full suite of information obtained through the feasibility and environmental review study processes to determine whether there is a federal interest in carrying out a specific alternative. For example, these studies should establish: (a) whether the benefits of a specific flood damage reduction alternative exceed the costs of that alternative, as required by 33 USC 701a; and (b) whether the specific alternative is the



least environmentally damaging alternative, as required by the Clean Water Act. There would not be a federal interest in carrying out a specific alternative that does not satisfy these legal requirements.

To ensure full compliance with federal law and policy, NWF recommends that the implementation guidance for Section 117:

1. Clarify that a determination of the federal interest in carrying out a specific alternative may only be issued after evaluation of the information obtained through the full feasibility study and environmental review study processes.

### **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.

NWF 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 [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. 119—Permanent Measures to Reduce Emergency Flood Fighting Needs for Communities Subject to Repetitive Flooding**

Section 119 provides new authority to study, design, and construct water resources projects for communities that have experienced repetitive flooding events and have received emergency flood fighting assistance under the P.L. 84-99 program. Such projects are to incorporate significant use of natural or nature based features to the maximum extent practical. The maximum Federal share for a project planned under this section is \$17.5 million, and the Corps is required to consider a community's ability to pay in determining whether to require a non-Federal cost share.

NWF recommends that the implementation guidance for Section 119:

1. Direct Corps staff to develop comprehensive guidance for the Section 119 program that includes at least each of the following provisions:
  - a. Project studies carried out under Section 119 will fully and carefully examine—and incorporate to the maximum extent practical—natural and nature-based measures, including by fully evaluating such measures through the final array of alternatives in project studies and ensuring that Section 119 projects comply with the National Water Resources Planning Policy (42 U.S.C § 1962–3).
  - b. To ensure compliance with the Section 119 requirement to incorporate significant use of natural or nature-based measures to the “maximum extent practical” project planners: (a) will assume that natural and nature-based measures are “practical” unless it is clearly demonstrated that such measures cannot provide, or significantly contribute to, an appropriate level of protection; and (b) may not reject a natural or nature-based measure as impractical simply because it may not be able to address all identified problems; in such cases natural and nature-based measures will be considered in combination with other types of nonstructural approaches, operational changes, and/or traditional structural infrastructure.

- c. Project planners will define the “project area” for Section 119 projects broadly enough to allow for consideration of large-scale alterations to existing flood control works, including through such things as: levee setbacks; spillways; bypasses; restoration of rivers, streams, wetlands, and floodplains; and expansion of natural buffers.
2. Direct Corps staff to undertake robust public engagement in the development of the Section 119 program guidance, including through a formal public notice and comment period before issuing final program guidance.
3. 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 the Section 119 program and opportunities for applying for participation in the program.
4. 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 [Environmental Justice Screening and Mapping Tool](#)); and (b) reach out directly to identified communities to explore their interest in participating in this program.
5. Direct Corps staff to follow the guidelines for ensuring meaningful community involvement developed pursuant to WRDA 2020 Section 112.
6. Direct the collection of data on repetitive flood loss infrastructure and on projects and structures that cause flood-related or natural resource problems, and make that information available to the public, including through the National Levee Database. This data, in combination with known constriction points, will help the Corps and the public identify locations where levee setbacks and other natural and nature-based measures could be particularly valuable. Data on PL 84-99 rehabilitation expenses including historic expenses and cumulative costs of rehabilitation should also be included in the National Levee Database.
7. Direct Corps planners to work with communities and other federal and state agencies to proactively plan for levee setbacks and natural and nature-based measures, including by:
  - a. Utilizing the levee inspection process to also identify locations where natural and nature-based measures could provide important benefits, with priority placed on repetitive loss infrastructure and known constriction points;
  - b. Identifying natural and nature-based solutions for P.L. 84-99 program levees in flood risk reduction studies performed under existing programs such as the Flood Risk Management Program, Planning Assistance to States, Silver Jackets, and specific flood risk management project authorizations; and
  - c. Identifying natural and nature-based solutions for P.L. 84-99 program levees when developing System-Wide Improvement Frameworks.

### Sec. 123—Review of Corps of Engineers Assets

Section 123 directs the Corps to develop an inventory of projects: (1) which are no longer necessary for the Corps’ mission responsibilities; (2) where long-term cost savings or increased resiliency could be

achieved through incorporation of natural or nature-based features, or (3) which no longer meet the authorized purposes due to deferred maintenance requirements. The Corps should prioritize the implementation of Section 123, which will provide important information on opportunities to increase the resiliency of the nation's water resources, restore the environment, and save taxpayer dollars.

In developing this inventory, NWF urges the Corps to also identify projects that could be re-operated to increase resiliency and allow wildlife to thrive (e.g., through changes to reservoir water control manuals or navigation operating plans). Outdated water control manuals and navigation operating plans can significantly increase the risk of flooding for many communities, and cause widespread harm to the environment. Outdated plans also cannot account for: (1) current and future needs or environmental conditions, including changes in rainfall, flood levels, snowmelt patterns, and land use patterns; (2) modern science, data, and modeling capabilities; (3) modern forecast-informed management tools that can help adapt operations to actual conditions; (4) current laws and policies, including the National Water Resources Planning Policy (42 U.S.C § 1962–3); or (5) state-of-the-art management approaches that can both ensure effective operations *and* protect the environment.

Water Control Manuals: The Corps operates 707 dams that it owns across the country and manages flood control operations at 134 dams constructed or operated by other federal, nonfederal, or private agencies.<sup>15</sup> Many of these dams have been operating under water control manuals that date back 50 years. For example, many of central California's 35 federal flood control dams rely on decades-old water control manuals that are damaging rivers and wildlife and threatening community safety.

Outdated operating procedures and flawed planning aggravated already horrific flooding in Houston during Hurricane Harvey. While a 1960s era water control manual limited the cumulative releases from the reservoirs in addition to uncontrolled runoff cannot exceed 2,000 cubic feet per second as measured at a gauging station 11 miles downstream,<sup>16</sup> the Corps released at least 13,000 cubic feet of water per second from the Addicks and Barker reservoirs during Hurricane Harvey to reduce the risks of overtopping and to protect homes upstream. But those same releases caused extensive flooding downstream in Buffalo Bayou, flooding some 4,000 homes that would otherwise have remained dry despite Harvey's onslaught.<sup>17</sup> Upstream homes also flooded, including more than 5,000 of the 14,000 homes located *inside the Corps reservoirs*.<sup>18</sup> Updating the management plans for these reservoirs, quickly

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<sup>15</sup> Government Accountability Office, Army Corps of Engineers, Additional Steps Needed for Review and Revision of Water Control Manuals, GAO-16-685, July 2016.

<sup>16</sup> USACE Galveston District, 2009 Master Plan, Addicks and Barker Reservoirs Buffalo Bayou And Tributaries Fort Bend And Harris Counties, Texas, U.S. Army Corps of Engineers, Galveston District (August 2009) at 8 (this master plan did not assess or evaluate changes to operation of the reservoirs) (available at <http://www.swg.usace.army.mil/Portals/26/docs/2009%20Addicks%20and%20Barker%20MP.pdf>). Preliminary U.S. Geological Survey data suggests that the actual releases were much higher than what was supposed to be a maximum release of 13,000 cubic feet per second because the gages measuring the releases were not working properly (<https://af.reuters.com/article/africaTech/idAFL2N1LQ0IL>).

<sup>17</sup> KHOU.com, Houston Texas, *Buffalo Bayou to remain at record level; Barker, Addicks reservoirs have peaked* (September 1, 2017) (<http://www.khou.com/weather/hurricanes/hurricane-harvey/controlled-release-of-barker-addicks-reservoirs-to-impact-thousands/468348109>).

<sup>18</sup> The in-reservoir homes were built on some 8,000 acres of land that the Corps opted not to buy when the reservoirs were constructed in the 1940s, even though the Corps knew the land would flood during large flood events. Al Shaw, Lisa Song, Kiah Collier, Neena Satija, *How Harvey Hurt Houston, in 10 Maps*, ProPublica (January 3, 2018) (<https://projects.propublica.org/graphics/harvey-maps>).

completing critical structural upgrades and other improvements, and ensuring that the public is fully aware of the reservoir flood risks would help protect Houstonians during future flood events.<sup>19</sup>

The Corps' Engineering Regulations recognize the importance of regular updates, and require the Corps to update water control plans on a continuous basis as needed, and at least every 10 years.<sup>20</sup> However, GAO reports that it is impossible to determine whether such reviews have in fact been carried out because the Corps does not consistently document or track critical information, including: (a) whether informal or formal reviews have been carried out; (b) the status of manuals, including whether manuals need to be updated; and (c) whether specific water control manuals are actually being followed to direct operation of a project.<sup>21</sup>

Navigation Operations and Maintenance Plans: The Corps manages 12,000 miles of inland commercial navigation channels, and many of these inland waterway systems are being managed under decades old management plans. For example, most of the management plans for the Upper Mississippi River navigation system are more than 40 years old.<sup>22</sup> Continued reliance on these outdated operating plans allows the Corps to continue to carry out the same activities that have devastated the river's ecological health and the species that rely on it. Activities allowed under these outdated plans continue to: destroy critical backwater, side channel, wetlands, and instream habitats; alter water depth; destroy bathymetric diversity; cause nonnative species to proliferate; and severely impact native species.<sup>23</sup> Modern approaches exist for operating this system that would both maintain a vibrant navigation system and improve the health of the river.

Accordingly, NWF recommends that the implementation guidance for Section 123:

1. Direct the Corps to include projects in the Section 123 inventory that could be re-operated to increase resiliency and improve fish and wildlife habitat, including through changes to water control manuals or navigation operating plans.
2. Direct the Corps to solicit public input regarding projects that should be considered for inclusion in the Section 123 inventory.

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<sup>19</sup> These reservoirs have been classified as two of the six most dangerous flood control dams in the United States for many years. Storage capacity could be restored by removing silt and sediment that have accumulated over the last 60-plus years of operation, and public safety would be improved by upgrading gages and other tools that track the quantity of water released from the reservoirs and by ensuring that the public is fully aware of the potential for flood risks from both typical and emergency reservoir operations.

<sup>20</sup> ER 1110-2-8154, 31 May 1995 (water control "plans must be reviewed and updated as needed but not less than every 10 years" and the "plans must achieve environmentally sustainable overall use of the resource"); ER 1110-2-8156, 31 Aug 1995 ("It is the policy of the Chief of Engineers that water control plans be continually reviewed, updated, and adjusted as needed to ensure that the best use is made of available water resources.").

<sup>21</sup> Government Accountability Office, Army Corps of Engineers, Additional Steps Needed for Review and Revision of Water Control Manuals, GAO-16-685, July 2016.

<sup>22</sup> As a result of extensive pressure, the Corps recently reassessed some, but not all, of its management activities for a segment of that system known as the Middle Mississippi River.

<sup>23</sup> U.S. Geological Survey, Ecological Status and Trends of the Upper Mississippi River System 1998: A Report of the Long Term Resource Monitoring Program (April 1999); Johnson, B. L., and K. H. Hagerty, editors. 2008. U.S. Geological Survey, Status and Trends of Selected Resources of the Upper Mississippi River System, December 2008, Technical Report LTRMP 2008-T002 (Upper Midwest Environmental Sciences Center, La Crosse, Wisconsin).

3. Direct the posting of the Section 123 inventory on the Corps' website within 10 days of completion.

### **Sec. 125—Beneficial Use of Dredged Material; Dredged Material Management Plans**

Section 125 facilitates strategic use of clean and appropriately sourced dredged materials to maximize environmentally sound flood and storm damage reduction measures by: (1) establishing a national policy to maximize the beneficial use of material obtained from Corps projects; (2) increasing the number of authorized beneficial use demonstration projects and prioritizing projects in economically disadvantaged communities; (3) improving assessment of the "federal standard" by requiring the Corps to calculate environmental benefits of the beneficial use; (4) directing the Corps to develop five-year regional dredged material management plans; and (5) emphasizing greater coordination across the Corps' dredging contracts.

This provision provides an important opportunity for facilitating vital ecological restoration in key regions, including the Mississippi River Delta where lack of sufficient sediment transport is severely aggravating coastal wetland losses. The Corps should prioritize development of the required regional dredged material management plans, improvements to assessing the federal standard, and prioritization of projects in economically disadvantaged communities. The Corps should also establish formal sidebars to beneficial reuse projects to protect public safety and the environment, including requiring that the sediments being beneficially reused are free of toxic contamination and fully compatible with the restoration site, and that the sediments are being used for a sustainable and legally-compliant restoration project.<sup>24</sup>

NWF recommends that the implementation guidance for Section 125:

1. Clarify that the development of dredged material management plans are to be based on high quality and up-to-date science, information, analyses, studies and data including: sediment samples and testing to determine contamination levels, water quality sampling, fish tissue sampling, benthos sampling, and other needed biological sampling.
2. Direct the establishment of formal sidebars to beneficial reuse projects to protect public safety and the environment, including requiring that: (a) the sediments being beneficially reused are free of toxic contamination; (b) the sediments being reused are fully compatible with the restoration site; and (c) the sediments are being used for a sustainable and legally-compliant restoration project.

### **Sec. 129—Missouri River Interception-Rearing Complex Construction**

Section 129(b) prohibits the Corps from restoring certain types of river habitats that are critical for the survival of the federally-endangered pallid sturgeon, pending completion of: a report, undefined future research, and an expansive river infrastructure repair plan. To minimize the risks to the survival of the pallid sturgeon, it is critical that the implementation guidance define the precise focus and parameters of the required research and repair plan, and establish detailed schedules with key milestones to ensure completion of the Section 129(a) report within the mandatory one year timeline and completion of the

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<sup>24</sup> Adverse impacts from beneficial reuse can include: re-suspending significant quantities of toxic sediments that harm people and wildlife, burying vital fish and wildlife habitat by placing sediment in an inappropriate location, harming fish and wildlife habitat by reusing sediments that are incompatible with the sensitive habitats upon which they are placed, and causing significant adverse impacts at the project providing the sediment source.

Section 129(b) research and repair plan within two years. This clarity is required to ensure a prompt lifting of the Section 129(b) prohibition on restoration actions needed to ensure the survival of the endangered pallid sturgeon.

NWF recommends that the implementation guidance for Section 129:

1. Establish a detailed schedule with key milestones to ensure completion of the report required by Section 129(a) within the mandatory one year timeline.
2. Define the precise focus and parameters of the “further research on interception-rearing complex design, including any effects on existing flows, flood risk management, and navigation” required by Section 129(b)(2). The implementation guidance should direct that this “further research” should build upon the research and analyses that have already been undertaken to determine the needs of the pallid sturgeon, the role of interception rearing complexes in addressing those needs, and the limited effects of those complexes on other project purposes. The implementation guidance should also direct the Corps to fully account for, and incorporate, the extremely limited amount of commercial navigation into the required assessment of impacts on navigation.
3. Establish a detailed schedule, with key milestones to ensure that the “further research” required by Section 129(b)(2) will be completed no later than two years from the date of enactment of WRDA 2020.
4. Establish a detailed schedule, with key milestones to ensure that the repair plan required by Section 129(b)(3) will be completed no later than two years from the date of enactment of WRDA 2020.

### **Sec. 133—Rehabilitation of Corps of Engineers Constructed Pump Stations**

Section 133 allows the Corps to increase the capacity of Corps-constructed pump stations and related drainage measures, or otherwise rehabilitate those pump stations, if the Secretary determines 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. 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.

NWF recommends that the implementation guidance for Section 133:

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. 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.”<sup>25</sup>
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. 146—Reviewing Hydropower at Corps of Engineers Facilities

Section 146 requires the Secretary to consider operational changes at a Corps project to facilitate production of non-Federal hydropower, upon the request of a non-Federal hydropower interest. The Secretary is further directed to evaluate the potential impacts of the requested change on authorized

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<sup>25</sup> *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).

project purposes, and to solicit input from interested stakeholders. The implementation guidance should clarify that reviews under Section 146 must comply with federal environmental laws and policies. The operational changes needed to facilitate hydropower outputs can have highly significant adverse impacts on in-stream flows, water quality, floodplain health, fish and wildlife resources, and public safety.

NWF recommends that the implementation guidance for Section 146:

1. Clarify that reviews under Section 146 must 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 146 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. 155—Small Water Storage Projects**

Section 155 creates a Corps program focused on constructing new water supply dams and reservoirs. Individual projects carried out under this section can cost as much as \$65 million. Despite being labelled as “small”, the covered storage projects will have highly significant adverse impacts on the nation’s rivers, wetlands, floodplains, and wildlife.

NWF recommends that the implementation guidance for Section 155:

1. Clarify that construction of a new water supply dam and reservoir is a major federal action significantly affecting the quality of the environment that, as a matter of law, requires preparation of an environmental impact statement.
2. Clarify that subsection (e), which addresses use of existing data, does not justify: a failure to collect new data when such data is necessary for proper planning; reliance on outdated data or information; or reliance on outdated or otherwise questionable studies and information. In light of the ongoing impacts of climate change, new hydrologic and environmental data should be obtained if existing data is more than five years old.

### **Sec. 160—Definition of Economically Disadvantaged Community**

Section 160 directs the Corps to define the term “economically-disadvantaged community” for purposes of this Act within 180 days and provide for public notice and comment on this definition. The Corps should prioritize this important work that is essential for developing and implementing projects that address the needs and priorities of economically disadvantaged communities.

NWF recommends that the implementation guidance for Section 160:

1. Consistent with WRDA 2020 Section 112 and its implementation guidance, direct the Corps to ensure, robust public input and direct engagement with non-governmental environmental and

social justice community groups and organizations, Tribes and Tribal organizations, state and local governments, and academia in developing this definition.

2. Direct careful evaluation and full consideration of the definitions used in the [Environmental Justice for All Act \(H.R. 5986\)](#) which was introduced on February 27, 2020.
3. Direct consultation and coordination with the Council on Environmental Quality, Environmental Protection Agency, and other federal agencies to promote alignment of definitions across federal programs as appropriate.

### **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.

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.<sup>26</sup>

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).
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:

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<sup>26</sup> 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](https://www.publications.usace.army.mil/Portals/76/Publications/EngineerRegulations/ER_1105-2-100.pdf)).

- 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."<sup>27</sup>
- b. The Clean Water Act, including the substantive and analytical requirements of Clean Water Act Section 404 and the 404(b)(1) Guidelines,<sup>28</sup> 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.
- 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.

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<sup>27</sup> *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 708 (10th Cir. 2009).

<sup>28</sup> 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.

- 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.”<sup>29</sup>

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.
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.

### **Sec. 212—Report on the Status of the Louisiana Coastal Area**

Section 212 requires the Corps to submit a report to Congress that summarizes: (a) the policies, strategies, plans, programs, projects, and activities undertaken to conserve, protect, restore, and maintain the coastal Louisiana ecosystem; and (b) the financial participation of each agency represented on the Coastal Louisiana Ecosystem Protection and Restoration Task Force. Swift completion of this report within one year, as directed by Section 212, is a critical step toward renewing and improving the

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<sup>29</sup> 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](https://www.publications.usace.army.mil/Portals/76/Publications/EngineerRegulations/ER_1105-2-100.pdf)).

federal coordination around, and commitment to, restoring the Mississippi River Delta, as originally intended under the Louisiana Coastal Area program (LCA).

The LCA was authorized in 2007 in partnership with the Coastal Protection and Restoration Authority of Louisiana (CPRA) to focus on a systematic approach to coastal restoration. The LCA authorized creation of the Coastal Louisiana Ecosystem Protection and Restoration Task Force, which was to include secretaries and heads of relevant federal agencies, CPRA, and two representatives of the state of Louisiana selected by the governor. The Task Force was intended to be a venue to address conservation and restoration activities throughout coastal Louisiana, but Task Force members were never appointed.

NWF recommends that the implementation guidance for Section 212:

1. Establish a clear schedule with key milestones to ensure completion of this important study within the one year timeline.
2. Direct a thorough investigation into the implications of the failure to appoint members to the Coastal Louisiana Ecosystem Protection and Restoration Task Force on the ability of the relevant federal agencies, CPRA, and state of Louisiana to carry out their important roles and responsibilities in advancing the long term sustainability of the nationally significant coastal Louisiana ecosystem.

### **Sec. 213—Lower Mississippi River Comprehensive Management Study**

Section 213 directs the Corps to conduct a comprehensive study of the entire Lower Mississippi River Basin from Cape Girardeau, Missouri, to the Gulf of Mexico, and make recommendations for the comprehensive management of this important system. This study could provide critical recommendations for improving management of this vital ecosystem to improve public health and safety, allow fish and wildlife to thrive, and increase resilience.

NWF recommends that the implementation guidance for Section 213:

1. Clarify that this critical and timely study will proceed at 100% federal expense, as intended by Congress. Negotiating any non-federal cost-share among the many states that could be impacted by the study is impractical and could delay this nationally-significant assessment.
2. Direct the Corps' New Orleans District to lead this study, which is both important and appropriate due to the specific directives to evaluate multiple projects within the geographic scope of the New Orleans District.
3. Direct a full evaluation of how ecosystem restoration projects could result in improved management of the Lower Mississippi River basin. This evaluation should include, but not be limited to, the specific ecosystem restoration projects identified in Section 213, including the Ama sediment diversion project, the Union freshwater diversion project, and the Increase Atchafalaya Flow to Terrebonne project.
4. Direct Corps planners to prioritize solutions that can address multiple purposes described in Section 213(a) while improving the long term health and resilience of the Mississippi River ecosystem and surrounding communities in the face of climate change. For example, this study



should explicitly evaluate how river diversions and other nature-based solutions will mitigate flooding and reduce the need to use the Bonnet Carré spillway during high flood events, in addition to restoring nearby ecosystems. This study should also evaluate whether improvements to navigation management activities could reduce flooding and/or improve ecosystem health.

5. Direct Corps planners to prioritize consideration of natural and nature-based feature solutions, pursuant to Section 115 of WRDA 2020, Section 1149(c) of WRDA 2018, and federal environmental laws and national priorities that include: the Clean Water Act (which requires use of the least environmentally damaging practicable alternative); the Congressionally established National Water Resources Planning Policy; increasing resilience to more frequent and intense floods, storms, and droughts; increasing equitable outcomes and correcting environmental injustice; and accounting for lost ecosystem services as a project cost. Grey infrastructure management structures serve the sole purpose of flood control and often transfer flood risks onto other communities, while natural and nature-based projects can protect against multiple flood types while supporting ecosystems and providing health benefits for people.
6. Direct Corps planners to robustly engage with communities affected by management of the Lower Mississippi River and the public, and incorporate the views and address the concerns of affected communities and the public, consistent with Section 112 of WRDA 2020. Particular efforts should be made to consult with low income communities, minority communities, and Tribes. The Corps' Coastal Texas Study is a strong model for public engagement.

### Sec. 221—Study on Water Supply and Water Conservation at Water Resources Development Projects

Section 221 requires the Secretary to report to Congress regarding the implications of, and any recommendations for, including municipal water supply and water conservation as primary Corps missions. Water conservation is critically important and should be a key focus of all Corps planning and activities. However, adding municipal water supply as a primary mission will lead to significant environmental harm and divert scarce resources away from other Corps programs.

NWF recommends that the implementation guidance for Section 221:

1. Explicitly direct the Corps to conduct two separate evaluations under Section 221. The first evaluation should examine the implications of adding water conservation as a primary mission. The second evaluation should examine the implications of adding municipal water supply as a primary Corps mission. These two mission areas would implicate fundamentally different approaches and result in fundamentally different impacts to fish and wildlife, water resources, public health and safety, and taxpayer dollars.
2. Direct the Corps to evaluate at least the following implications when carrying out the two separate evaluations referenced above: (a) the implications on Corps resources and funding needs; (b) the potential for diverting funding and resources away from the Corps' current primary missions and programs; (c) the implications for the Corps' other missions, including the Corps' ecosystem restoration and protection mission; (d) the implications for wetland and stream resources; (e) the implications for in-stream flows; (f) the implications for groundwater levels and groundwater recharge capabilities; (g) the implications for water quality; (h) the implications for increasing or extending drought-type conditions in areas downstream; (i) the implications for resilient fish and wildlife populations; (j) the implications for future operation, maintenance, and

major rehabilitation costs and responsibilities; and (k) the implications for public safety, including for downstream communities.

### Sec. 301—Deauthorization of Inactive Projects

Section 301 establishes a unified process for the deauthorization of \$10 billion in antiquated or inactive water resources development projects. This provision will help ensure that limited taxpayer resources are not spent on water resources projects that are no longer needed; do not make sense in light of current conditions, and modern science and resource management; or would undermine the resilience of the nation's water resources, communities, and wildlife. The Corps should ensure full compliance with Section 301, including the important restudy provisions in Section 301(g).

NWF also urges that the implementation guidance for Section 301(g) explicitly apply the Section 301(g) requirements to projects where physical construction has not taken place in 20 years, even if preliminary construction had been initiated or carried out before that date. The completion of any such project clearly is not a priority; and the project's more than 20-year old planning documents are unquestionably out-of-date and cannot account for such things as: (1) current and future needs or environmental conditions, including changes in rainfall, flood levels, snowmelt patterns, and land use patterns; (2) the impacts of climate change, including rising sea levels; (3) modern science, data, and modeling capabilities; (4) state-of-the-art river and floodplain management techniques, and natural and nature-based solutions for reducing flood and storm damages; (4) current understanding of the direct, indirect, and cumulative environmental impacts of the project, (5) current project costs; and (6) current laws, policies, and national priorities, including the National Water Resources Planning Policy (42 U.S.C § 1962–3), the requirements applicable to mitigating the impacts of civil works projects, the requirements to fully consider natural and nature-based feature alternatives, and the urgent need to address environmental injustice.

NWF recommends that the implementation guidance for Section 301:

1. Direct a comprehensive accounting of Corps projects to identify all projects that meet the criteria for inclusion on the Section 301(b)(1) preliminary list of projects to be deauthorized.
2. Define the term “obligated for construction” as the date of the award of a construction contract.
3. Explicitly apply the Section 301(g) post-authorization change study requirements to projects where physical construction has not taken place in 20 years, even if preliminary construction had been initiated or carried out before that date.
4. Make the list of projects that must comply with the Section 301(g) requirements before any construction could take place available to the public, including on the internet, and update that list on a yearly basis.

## 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."<sup>30</sup> 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."

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.<sup>31</sup> 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.

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<sup>30</sup> 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.

<sup>31</sup> 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.

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.<sup>32</sup>

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

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<sup>32</sup> According to the guidance, “Corps HQ Civil Works Planning Division and Regulatory Branch jointly determined in 2009 that upon the incorporation of the requirements of Section 2036 of WRDA 2007, as amended, the mitigation planning process outlined in ER 1105-2-100 is consistent with the standards and policies of the Regulatory program, as described in Compensatory Mitigation for Losses of Aquatic Resources, Final Rule, Federal Register, Volume 73, No. 70, Pages 19594-61065, April 10, 2008 (reference 2.e, above).”

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.”<sup>33</sup>

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.”<sup>34</sup> Indeed, it is a court’s “duty ‘to give effect, if possible, to every clause and work of a statute.’”<sup>35</sup> As a result, “a statute must, if possible, be construed in such fashion that every word has some operative effect.”<sup>36</sup> Moreover, “unless otherwise defined, words [of a statute] will be interpreted as taking their ordinary, contemporary, common meaning.”<sup>37</sup> 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 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.**<sup>38</sup>

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<sup>33</sup> 33 U.S.C. § 2283(d)(1) (emphasis added).

<sup>34</sup> *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

<sup>35</sup> *United States v. Manasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)).

<sup>36</sup> *U. S. v. Nordic Village*, 503 U.S. 30, 36 (1992).

<sup>37</sup> *Perrin v. United States*, 444 U.S. 37, 42 (1979).

<sup>38</sup> Congressional Record, Water Resources Development Act of 2007—Conference Report, September 24, 2007 at [S119817](#) (emphasis added).

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.<sup>39</sup>

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.

### 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](mailto:sametm@nwf.org) if I can provide additional information or clarifications on our recommendations.

Sincerely,



Melissa Samet  
Senior Water Resources Counsel

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

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<sup>39</sup> Congressional Record—Senate, Water Resources Development Act of 2007, May 15, 2007 at [S6122](#) (emphasis added).

## **Attachment A**

to

National Wildlife Federation  
Comments on the Implementation Guidance for the  
Water Resources Development Act of 2020  
Docket No. COE-2021-0002

May 7, 2021

Audubon Louisiana \* Audubon Mississippi \* Baton Rouge Audubon Society  
CLIMB CDC \* Coalition to Restore Coastal Louisiana \* Environmental Defense Fund  
Gulf Islands Conservancy, Inc. \* Gulf Restoration Network \* Jackson Audubon Society  
Louisiana Audubon Council \* Louisiana Wildlife Federation  
Lower Pearl River Watershed Conservation District \* Mississippi Ornithological Society  
Mississippi Chapter of American Society of Landscape Architects  
Mississippi Chapter Sierra Club \* Mississippi Commercial Fisheries United  
Mississippi Forestry Association \* Mississippi Wildlife Federation \* National Audubon Society  
National Wildlife Federation \* North Gulfport Community Land Trust \* Orleans Audubon Society  
Pearl Riverkeeper \* Rural Property Rights Association of MS \* Wolf River Conservation Society

July 3, 2018

Colonel Michael C. Derosier  
Commander, Vicksburg District  
U.S. Army Corps of Engineers  
4155 Clay Street  
Vicksburg, MS 39183

Re: Integrated Draft Feasibility & Environmental Impact Statement; Pearl River Basin, Mississippi  
Federal Flood Risk Management Project Hinds and Rankins Counties, MS

Dear Colonel Derosier:

On behalf of our millions of members and supporters, our organizations ask that the Vicksburg District take control of the public comment process for the Pearl River study as required by ER 1105-2-100, and immediately initiate an independent external peer review for this study as required by 33 U.S.C. 2343. These actions are essential for ensuring compliance with the National Environmental Policy Act (NEPA) and the Water Resources Development Act.

As you take control of the public comment process we ask that you put a hold on the current public comment period and then properly notice a new 60-day public comment period, including through a formal notice in the Federal Register, once the required Fish and Wildlife Coordination Act Report, Biological Assessment and any needed Biological Opinion, and Independent External Peer Review Report are made available to the public.

**A. Section 211 Requires Full Compliance with Environmental Laws and Planning Requirements**

As you know, the Pearl River study is being conducted by the Rankin Hinds Pearl River Flood & Drainage Control District (Rankins Hinds District) under section 211 of the Water Resources Development Act of 1996. This study's tentatively selected alternative, known as the One Lake Proposal, would dam and dredge an ecologically rich section of the Pearl River to create an artificial lake in the heart of Jackson Mississippi, bury more than 1,800 acres of vital floodplain wetlands and other waters, eliminate miles of habitat for two federally protected species, and reduce vital freshwater flows reaching the Gulf of Mexico.



Critically, section 211 does not waive any laws or planning requirements. As a result, all federal environmental laws and planning requirements that apply to a study carried out by the Corps of Engineers also apply to the Pearl River study. This is fully recognized by the Corps' Engineering Regulations which explicitly require the District to "retain responsibility for fulfilling the NEPA requirements, including any necessary scoping meetings, public reviews, filings with EPA" for section 211 studies.<sup>1</sup> ER 1105-2-100 Appendix H, Amendment #1 20 Nov 07. The District also "should expect to conduct peer, policy and legal reviews" for section 211 studies. *Id.*

## **B. The Current Public Comment Process Is Fundamentally Flawed**

Among other things, NEPA requires the Corps to facilitate public involvement in decision making to the fullest extent possible, including providing a meaningful opportunity for the public to provide comments on draft environmental impact statements ("draft EIS"). At a minimum, this requires providing the public with: sufficient notice of the opportunity to provide comments; sufficient time to review the draft EIS and prepare comments; and access to the entire analysis of alternatives and impacts. As the U.S. Court of Appeals for the Tenth Circuit has so aptly stated, "[a] public comment period is beneficial only to the extent the public has meaningful information on which to comment . . ."<sup>2</sup>

Regrettably, the Rankin Hinds District has not satisfied these fundamental requirements for at least the following three reasons.

First, the public notice provided by the Rankin Hinds District is inadequate. The highly controversial nature of the One Lake Project, the project's severe and extensive adverse impacts, and the strong opposition from many downstream communities warrants a much more robust effort to notify the public. The public comment period for the Pearl River study should be noticed in the Federal Register, through direct mailings to the many interested parties (including to the individuals and organizations that filed scoping comments and to the communities that have formally opposed the project), and through the many other means recommended in the NEPA implementing regulations.

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<sup>1</sup> The full text relevant provision is as follows: "H-8. 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." ER 1105-2-100 Appendix H, Amendment #1 20 Nov 07 (available at [https://www.publications.usace.army.mil/Portals/76/Publications/EngineerRegulations/ER\\_1105-2-100.pdf](https://www.publications.usace.army.mil/Portals/76/Publications/EngineerRegulations/ER_1105-2-100.pdf)).

<sup>2</sup> *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 708 (10th Cir. 2009).

Second, the 45-day public comment period is far too short. The draft EIS is extensive and proposes a major project that would cause significant harm to the environment. The One Lake Project will destroy extensive wetland and natural river habitats that support a vast array of fish and wildlife species, eliminate the vital natural flood protection provided by 1,800 acres of floodplain wetlands and other waters, and negatively impact water levels in the lower Pearl River and salinity levels in the estuary. Analyzing the draft EIS and providing meaningful comments on this major project proposal will take longer than 45 days. The difficulty in providing effective comments in this short time period are greatly amplified by the materials that are missing from the draft EIS. These missing materials include the Fish and Wildlife Coordination Act Report, the Biological Assessment and any needed Biological Opinion, and the Independent External Peer Review Report.

Third, the draft EIS is missing critical information that is fundamental to fully understanding the impacts of the One Lake proposal and alternatives to that proposal. As noted above, this missing information includes the Fish and Wildlife Coordination Act Report, the Biological Assessment and any needed Biological Opinion, and the Independent External Peer Review Report. The absence of the information provided by these critical and mandatory reports creates enormous barriers to the effective public and expert scrutiny that is essential to proper implementation of NEPA.

These deficiencies create significant barriers to the public's ability to meaningfully comment on this environmentally destructive and highly controversial project. To correct these deficiencies, our organizations urge the Corps to take control of the public comment process as directed by ER 1105-2-100. We ask that you put a hold on the current public comment period and then properly notice a new 60-day public comment period, including through a formal notice in the Federal Register, once the required Fish and Wildlife Coordination Act Report, Biological Assessment and any needed Biological Opinion, and Independent External Peer Review Report are made available to the public.

### **C. The Pearl River Study Requires an Independent External Peer Review**

The Pearl River study must be reviewed under the Independent External Peer Review (IEPR) process established by the Water Resources Development Act of 2007. 33 USC 2343. The Pearl River study clearly triggers mandatory IEPR under this provision as it evaluates a highly controversial civil works project that will cost well over \$200 million. 33 USC 2343(a). As noted above, ER 1105-2-100 states that the District "should expect to conduct peer, policy and legal reviews" for section 211 studies. ER 1105-2-100 Appendix H, Amendment #1 20 Nov 07.

Our organizations have been advised that an independent review process is underway for the Pearl River study, but we have been unable to locate any IEPR information online. As you know, "in all cases" the IEPR peer review is to be carried out "during the period beginning on the date of the signing of the feasibility cost-sharing agreement" and ending "not more than 60 days after the last day of the public comment period for the draft project study," unless the Chief of Engineers determines that more time is necessary. 33 USC 2343(b) and 2343(d). The Corps provides IEPR plans online, and is required by law to provide the public with information on the timing of the IEPR, the entity that has the contract for the IEPR review, and the names and qualifications of the IEPR panel members. 33 USC 2343(c).

If the IEPR study required by 33 USC 2343 is underway, we ask that the Corps provide us with the information outlined above as soon as possible. If the required IEPR study is not underway, we ask that

Col. Derosier  
July 3, 2018  
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the Corps immediately initiate the IEPR process and provide us with the required information as soon as it becomes available.

#### **D. Conclusion**

Our organizations urge the Corps to take control of the public comment process and take all other steps necessary to ensure that the Pearl River study complies with the National Environmental Policy Act and the nation's other bedrock environmental laws, and with the Water Resources Development Acts. Please contact Melissa Samet at the National Wildlife Federation ([sametm@nwf.org](mailto:sametm@nwf.org), 415-762-8264) if you have any questions or require additional information.

We look forward to a written response to this letter. Thank you for your assistance.

Sincerely,

Audubon Louisiana  
Audubon Mississippi  
Baton Rouge Audubon Society  
CLIMB CDC  
Coalition to Restore Coastal Louisiana  
Environmental Defense Fund  
Gulf Islands Conservancy, Inc.  
Gulf Restoration Network  
Jackson Audubon Society  
Louisiana Audubon Council  
Louisiana Wildlife Federation  
Lower Pearl River Watershed Conservation District  
Mississippi Ornithological Society  
Mississippi Chapter of American Society of Landscape Architects  
Mississippi Chapter Sierra Club  
Mississippi Commercial Fisheries United  
Mississippi Forestry Association  
Mississippi Wildlife Federation  
National Audubon Society  
National Wildlife Federation  
North Gulfport Community Land Trust  
Orleans Audubon Society  
Pearl Riverkeeper  
Rural Property Rights Association of MS  
Wolf River Conservation Society

cc: Rankin Hinds Pearl River Flood & Drainage Control District



December 23, 2019

**Via Electronic Mail:** [merle.e.weintraub.civ@mail.mil](mailto:merle.e.weintraub.civ@mail.mil) and [david.j.leach5.civ@mail.mil](mailto:david.j.leach5.civ@mail.mil)

Ryan Fisher  
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David Leach  
Deputy Assistant Secretary of Project Planning and Review  
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441 G Street NW, Room 6P82  
Washington, DC 20314

**Re: Clarification Request on Review Process for the Proposed Pearl River Basin, Mississippi, Federal Flood Risk Management Project, Hinds and Rankin Counties, MS (“One Lake”)**

Dear Mr. Fisher and Mr. Leach,

We write to express our appreciation for the opportunity to meet with you and your staff in October to discuss the Proposed Pearl River Basin, Mississippi, Federal Flood Risk Management Project, Hinds and Rankin Counties, MS (locally known as “One Lake”). This project is currently being planned by the project’s non-federal sponsor, the Rankin-Hinds Pearl River Flood and Drainage Control District (Drainage District).

We reiterate our organizations’ serious concerns about the extensive harm One Lake poses to public health and safety, and the ecology of the Pearl River Basin and that of the Gulf of Mexico. These concerns, and the many deficiencies in the June 13, 2018, project study prepared by the Drainage District, have resulted in overwhelming opposition by political and community leaders, business and conservation interests, and the public. Rather than moving forward with this dangerous project, our organizations believe that natural infrastructure and non-structural measures should be utilized to provide meaningful and lasting flood risk reduction while increasing resiliency for the Greater Jackson community.

We appreciate the insight that you provided into the process that will be used to plan the One Lake process. Specifically, we understand that the current proposal was authorized under Section 3104 of WRDA 2007 using the Section 211 process. Since Section 211 was repealed, One Lake is following the process set forth in Section 203 of WRDA 1996. As you described to us, Section 203 directs the Drainage District to transmit their One Lake feasibility study and draft Environmental Impact Statement (EIS) to the ASACW’s office, which retains ultimate review and approval authority. You advised us that if the

ASACW's office determines that the study and draft EIS satisfy the requirements applicable to USACE-developed feasibility studies and EISs, the USACE would then initiate a formal comment period on the draft EIS by issuing a notice in the Federal Register.

Given the complexities of this matter, however, we respectfully request that your office provide us with a written roadmap detailing the criteria that will be used to determine whether the Drainage District study satisfies the USACE requirements, and the steps that will be followed if that study or a subsequent version of the Drainage District study is approved. We ask that this roadmap include the steps, timeline, and parties responsible for:

- (a) Reviewing, and approving or denying approval of, the Drainage District's study; and
- (b) Carrying out the next steps in the process should that study be approved.

For example, if the study is approved, who is responsible for finalizing the EIS and ensuring full compliance with the National Environmental Policy Act and other applicable laws? Who is responsible for initiating and responding to the mandatory Independent External Peer Review? If the Corps rejects the current Drainage District study, will a new Biological Opinion be prepared that takes account of the information contained in any revised feasibility study and EIS? When will the Fish and Wildlife Coordination Act report be completed, and will a second report be prepared if the Corps rejects the current Drainage District study?

Notably, soon after our meetings with you, a few of our partners conducted a similar briefing on One Lake for USACE Vicksburg District Commanding Officer Robert Hilliard and his staff. The Vicksburg Corps office acknowledged that they were working on the Agency Technical Review certification process but were awaiting implementation guidance from the ASACW. They also shared the expectation that once the ASACW's office received the EIS, it would be transferred to the Office of Water Project Review; this appears to be different from what your office described to us. Thus, it appears much uncertainty exists within the Vicksburg office, which further confirms that a detailed roadmap from your office would be useful to others as well.

In closing, thank you again for meeting with us and your consideration of our request. We look forward to continuing a constructive dialogue on this and related matters. Please do not hesitate to let us know how we can be helpful to the ASACW.

Sincerely yours,



Jill Mastrototaro  
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Audubon Mississippi  
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