



WATERWAYS COUNCIL, INC.

801 North Quincy Street • Suite 200 • Arlington, VA 22203 • (703) 373-2261 • www.waterwayscouncil.org

Written Comments of R. Barry Palmer, President and CEO, Waterways Council, Inc., October 14, 2008, to Mr. Larry Prather, Assistant Director of Civil Works, Attn: P & G Revision, CECW-ZA, HQUSACE, 441 G Street, NW., Washington, DC 20314-1000

Re: Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies: Availability of Proposed Principles and Request for Comments (73 Federal Register 52960-4, September 12, 2008)

On September 12, 2008, the U.S. Army Corps of Engineers (Corps) published in the Notice section of the Federal Register and requested comments on proposed revisions to the Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies (P&G). Waterways Council, Inc (WCI) is pleased to respond to the Corps' request and to submit these comments on the proposed revisions to the P&G.

Waterways Council, Inc, is the preeminent national public policy organization advocating a modern and well-maintained national system of ports and inland waterways. Our nearly 300 members include shippers and receivers of commodities, waterways carriers, ports, shipping associations and waterways advocacy groups from all regions of the country. These comments are intended to reflect the views and interests of this broad, diverse, and nationally-important membership.

Phased approach. Section 2031 of the Water Resources Development Act of 2007 (WRDA 2007) requires the Secretary of the Army (Secretary) to revise the P&G applicable to Corps water resources projects within two years of WRDA 2007's date of enactment. The Corps proposes to implement this requirement in phases, with the first phase addressing only the "Principles" and the second phase addressing "more detailed implementing guidance". Thus, the September 12 Federal Register notice deals only with proposed revisions to the Principles.

Comment. Both the Principles and the Guidelines (or "Standards", if a decision is made to so characterize them) should be revised at the same time rather than separately in two distinct phases. The Principles and Guidelines are the two fundamental conceptual pillars of the Corps water resources project planning structure. They are—or should be—inextricably linked in concept and operation. One without the other is like a bell without the gong. They cannot be understood or critiqued properly in isolation from each other. The Corps should withdraw the

September 12 proposal and only re-publish proposed revisions of the Principles at the same time as and in conjunction with proposed revision of the Guidelines. If the Corps desires to continue to follow a two-phase approach, the first phase should be the co-incident proposal of revisions to both the Principles and the Guidelines and the second phase should be the proposal or issuance of detailed implementing procedures and organizational requirements.

Independent Peer Review. The Water resources Development Act of 2007 established new mandatory requirements for independent peer review of many new Corps water resource project studies. The arguments that led to the Congressional decision to call for independent peer review of individual projects in WRDA 2007 also support a requirement for peer review of the rules under which project studies must be conducted, i.e., of the P&G.

Comment. The Corps should submit at the same time both the revised Principles and the revised Guidelines to the National Academy of Sciences or other qualified organization for external independent review and critique of the P&G revision proposal. The independent peer review should be completed prior to the publication in the Federal Register of the proposed P&G revisions. The Federal Register notice informing the public about the P&G revision proposal should include a summary of the recommendations made by the peer review team, the peer review team's rationale for each recommendation, and the Corps' response to each recommendation. In this way the public can have full benefit of the results of the peer review process in terms of understanding what the Corps is proposing and why it is being proposed before the public is expected to comment itself on the proposed P&G revisions. The September 12 proposal should be withdrawn and should not be re-proposed until the process outlined in this comment has been followed.

Minimally acceptable BCR. Section 9.2 of the revised Principles proposal suggests that, for commercial navigation project features, hydropower project feature, certain flood and storm damage reduction project features, and certain multiple objective projects, the project plan which the Corps recommends must have no less than a 1.5 benefit cost ratio. The Section further states that a plan with an increasingly higher benefit cost ratio should be more heavily weighted in the selection process. These proposed new "minimally acceptable BCR" requirements would supplant the current long-standing rule for such project features that a feature's economic benefits must exceed its economic cost.

Comment. There is no WRDA 2007 statutory or legislative history support for the "minimally acceptable BCR" requirement included in the September 12 proposed revisions to the Principles. In fact, exactly the opposite is true: both the legislative history of WRDA 2007 and its express statutory language indicate Congressional intent contrary to the proposed minimum 1.5 BCR requirement. In

the years leading up to enactment of WRDA 2007, several witnesses at relevant Congressional committee hearings on the legislation specifically recommended that Congress require in WRDA minimum BCR's higher than 1.0 for affected projects. Both the House of Representatives and the Senate rejected the elevated BCR proposal. Further, inclusion of the proposed minimally acceptable BCR requirement directly contravenes Section 2033 of WRDA 2007 which provides, in the pertinent part of that statutory provision dealing with Corps planning and the preparation of water resources project feasibility reports, that "The alternatives contained in studies and assessments...shall not be constrained by budgetary or other policy" (emphasis added). The proposal to require a minimum 1.5 BCR for commercial navigation and other projects and project features should be rejected and the proposed Principles should be revised to delete the 1.5 BCR requirement. The proposed requirement to more heavily weight a plan with an increasingly higher benefit cost ratio also should be deleted for similar reasons.

Watershed analysis. Section 2031(b)(3)(D) of WRDA 2007 requires the Corps to "...ensure that the Principles and Guidelines address...(the) assessment and evaluation of the interaction of a project with other water resources projects and programs within a region or watershed." In keeping with this WRDA provision, Section 4 of the September 12 proposed Principles states that "water and related land resources planning should commence from the watershed level...(and be) primarily informed by...watershed analysis wherein proposed projects are considered in the full light of upstream and downstream conditions and needs that...are part of a complementary systems solution."

Comment. It is important that, as WRDA 2007 requires, policy-makers and the public have the basis for understanding how a proposed Corps project interacts with other projects or programs within a watershed. How much more than that is or may be envisioned by language in the September 12 proposal such as "full light of upstream and downstream conditions and needs" and "are part of a complementary systems solution" is impossible to discern without, at a minimum, the additional clarification that presumably would be provided in accompanying---but missing---proposed revisions of the Guidelines. As proposed, the September 12 suggested revision of the Principles raises more questions than it answers. For example, in a world described in proposed Section 4 as one where "water...resources have many, and at times competing alternate uses", what breadth and level of detail of examination, as well as what range of alternate uses, is intended to "identify and address the synergies and trade-offs associated with these multiple uses"? If, as proposed Section 4 suggests, water resources projects "must be part of a complementary systems solution", does that presuppose that a comprehensive, systematic watershed-based plan must exist in the first instance? Where such a systematic watershed-based plan does not currently exist, does that mean that individual project planning cannot proceed until the watershed-based plan has been completed? How long will it take and

what will it cost to complete a comprehensive systematic watershed-based plan? How will such a watershed-based plan adequately account for and protect differences in individual state water laws? As the Corps proceeds to “consider alternatives and strategies for implementation by other Federal agencies, state and local agencies...” and others, what unintended legal and institutional role-related controversies will be created? And how will any of this simplify and expedite a Corps project planning process that is already notorious for taking far too long and costing far too much? Meaningful public understanding and assessment of the issues raised by these and other questions cannot reasonably occur until reviewed in conjunction with publication of whatever proposed new Guidelines are intended to implement the proposed new Principles. Prior to promulgating any revision of the Principles, the Corps should make necessary revisions to the September 12 proposed Principles as suggested in these comments and resubmit the revised proposed Principles, together with the Corps proposed Guidelines, for public review and comment.