



**WATERWAYS**  
COUNCIL, INC.

April 5, 2010

Council on Environmental Quality  
Attn: Terry Breymann, Deputy Associate Director  
for Natural Resources  
722 Jackson Place, N.W.  
Washington, D.C. 20503

Re: Council on Environmental Quality (CEQ) Notice and Request for Comments on "Draft Principles and Standards Sections of the 'Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies'" (74 Fed. Reg. 65102-65103, December 9, 2009)

Dear Mr. Breymann:

On behalf of Waterways Council, Inc. (WCI), I am pleased to respond to the Council on Environmental Quality's request for comments on the draft revisions to the "Principles and Standards" that CEQ published in the Notice section of the Federal Register on December 9 of last year.

Waterways Council, Inc. is the national public policy organization advocating a modern and well-maintained national system of ports and inland waterways. Our 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.

Prior relevant comments incorporated by reference. Section 2031 of the Water Resources Development Act of 2007 (P.L.110-114) directs the Secretary of the Army to revise the 1983 Principles and Guidelines (P&G) applicable to the Corps of Engineers. Pursuant to Section 2031, in September of 2008, the U.S. Army Corps of Engineers published in the Federal Register proposed revisions to the P&G and requested comments on the proposed revisions. Waterways Council, Inc. submitted its comments on October 14, 2009. While the September 2008 proposed revisions differ in a number of respects from the December 2009 draft CEQ proposal, both proposals (1) pursue only the first phase of a two-phase approach that creates significant confusion by, among other things, not addressing the planning principles and the implementation guidelines at the same time, (2) call for independent peer review of the proposed revisions in a fashion that deprives the public of the benefit of the results of that peer review before the public is expected to comment, and (3) require a watershed-based analysis that raises more questions than it answers about what is intended by this requirement and how it is meant to apply to proposed water resource projects. In its October 2008 submission, WCI provided comments

related to each of these deficiencies and, because they continue to be relevant to CEQ's December 2009 proposal, albeit with different section and language citations and with somewhat revised concepts, WCI incorporates those comments by reference in this submission. (See attachment).

Improper subordination of the economic objective. In announcing the December 9 proposed revisions, CEQ's press release described the new proposal as intended to de-emphasize the importance of economic development as a goal of water resources development in this country. The proposal clearly does that to the point, WCI believes, that the goal of economic development unwisely and contrary to Congressional intent is subordinated to the goal of ecosystem restoration, notwithstanding the CEQ press release's claim that the two are "co-equal goals". WCI supports water resources development that reflects a heightened sensitivity to protecting important environmental values and seeks to produce environmentally sustainable solutions to the nation's transportation-related water resources development challenges. At the same time, WCI believes that what allows this great nation the opportunity in the first instance to address important environmental objectives is the nation's ability to have a robust economy that is strong enough to generate the financial resources that are necessary to address the environmental challenges and opportunities we face. As our country struggles to emerge from the greatest economic crisis that we have faced since the Great Depression and as we together must come to terms with and increasingly overcome international economic challenges that significantly threaten our nation's future standard of living and security, the last thing we should be doing is establishing new water resources development policy that diminishes the importance of protecting and advancing our nation's economic well-being. Yet that is precisely what CEQ's December 9 proposal will likely do in WCI's view. In an effort to rebalance federal water resources project planning efforts, CEQ has over-reacted and proposed an even more unbalanced set of principles and standards. The overwhelming thrust of CEQ's proposal is to so advantage environmental enhancement projects and environmental enhancement features of economic projects that legitimate and necessary economic development opportunities associated with water resources projects too often will be undervalued and missed. This is not what Congress intended when it enacted WRDA 2007's Section 2031.

Inadequate recognition of nonfederal sponsor role. More than 20 years ago, in the Water Resources Development Act of 1986 (P.L. 99-662 or WRDA 86), Congress significantly revised Corps of Engineers water resources programmatic authorities. Included in WRDA 86's policy revisions were new generally-applicable requirements for nonfederal interests to cost share both most new individual feasibility-level project planning studies and the construction of any water resources project resulting from the relevant study. Congress' motivation for these new Corps policy requirements was multifaceted. In addition to helping relieve the financial pressure on the U.S. Treasury, Congress wanted to increase the role that the project's nonfederal cost sharing partner played in helping decide what the optimum water project's features should be for any

given Corps project and, by extension, how the broader Corps program should be structured. Congress felt that such an increased role for the nonfederal sponsor was entirely appropriate given the sponsor's significant financial and other interests in and commitment to the project. This WRDA 86 policy fostering increased participation by nonfederal Corps project sponsors in project formulation and execution has been maintained and, if anything, enhanced since WRDA 86's enactment. The December 9 CEQ proposal completely fails to recognize the special status, interests and role of the nonfederal cost sharing sponsors of Corps projects in the planning process and must be revised to remedy this deficiency.

Unclear, untested, internally inconsistent, unreasonable concepts. The CEQ draft Principles and Standards contain a number of concepts and provisions that are unclear, untested, internally inconsistent, or unreasonable, as illustrated in the following examples.

Monetization. The CEQ proposal requires that national benefits and costs must be accounted for "in appropriate monetary and non-monetary terms" and, to accomplish this standard, directs that "planners shall strive to monetize currently non-monetized units "to the extent possible" (emphasis added). The blanket monetization requirement and its "to the extent possible" feature go far beyond what is appropriate or reasonable, particularly in light of the high degree of disagreement that exists within the economics profession and elsewhere about whether and, if so, how it is proper to measure and monetize the benefits of environmental and social services. To make matters worse, a method to monetize may be "possible" from a mathematical or formulaic perspective but at the same time be broadly recognized as not appropriate under the circumstances being considered by the planner.

National Objective. The CEQ proposal's "national objective of water resources planning" is to "maximize net national economic, environmental, and social benefits". While the objective as stated is laudable, the lack in the proposal of an understandable and reasonable approach to achieving that objective through appropriate direction to planners on how to evaluate and make comparisons and tradeoffs among "economic, environmental, and social benefits" will inevitably lead to subjective ad hoc decision-making by planners that in turn will result in significantly inconsistent project planning outcomes from one planner to the next as planning occurs throughout the Corps Civil Works Program's many Divisions and Districts..

Watershed-based. CEQ's December 9 proposal establishes a water resources planning standard that requires every new federal water resources implementation study to "utilize watershed and ecosystem based approaches". At the same time the CEQ proposal provides that "The Principles and Standards do not apply to ... watershed plans...." This apparent inconsistency at a minimum needs to be explained and rationally justified, particularly in terms of identifying which of the proposed standard's specific features is inappropriate for watershed plans.

**Mitigation.** CEQ also proposes the establishment of a planning standard titled “Account for Significant Effects and Mitigate Unavoidable Impacts to Ecosystem Services”. The standard requires that “the following sequence shall be followed to address adverse impacts to ecosystem services” and, as drafted, requires as an initial mandate and without qualification that “whenever possible” adverse impacts must be avoided. Such a formulation would seem to go far beyond what is reasonable. For example, a planner faced with two potential alternatives, one an alternative that produces some adverse ecosystem impacts that can’t be reduced by modifying the alternative but also produces clearly superior economic benefits and the other an alternative that does not produce adverse ecosystem impacts but produces clearly inferior economic benefits must always, under the proposed standard as written, bypass the former alternative in favor of the second because it is “possible” to avoid those impacts. Such a result would seem to be required under the proposal even where the ecosystem impacts were insignificant, notwithstanding the title of the proposed standard. This provision must be revised to more reasonably and more workably accomplish its avoid/minimize/mitigate approach.

# **ATTACHMENT**



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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 pre-suppose 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.