



*Working to protect the Mississippi River
and its watershed in the Twin Cities area.*

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February 12, 2019

Ms. Ada Benavides
Senior Policy Advisor
Headquarters, U.S. Army Corps of Engineers
441 G Street NW., Room 3F86
Washington, DC 20314-1000

Re: Implementation Guidance for the Water Resources Development Act of 2018

Dear Ms. Benavides:

Friends of the Mississippi River engages people to protect, restore and enhance the Mississippi River and its watershed in the Twin Cities region of Minnesota. On behalf of the thousands of volunteers and advocates that work with FMR each year to restore our river, thank you for the opportunity to comment on implementation guidance for the Water Resources Development Act.

The increasing storms, floods, and droughts being wrought by climate change make it more important than ever for the U.S. Army Corps of Engineers (Corps) to utilize modern and environmentally sound approaches when planning water resources projects. Friends of the Mississippi River urges the Corps to adopt the recommendations outlined below to help ensure that federal investments in the nation's water resources will protect and restore the environment, as required by a host of federal environmental laws and policies including the National Water Resources Planning Policy (WRDA 2007 § 2031, 42 USC 1962–3), and increase the resiliency of people and wildlife to climate change.

Water Resources Development Act of 2018

Section 1115. Property Acquisition:

Section 1115 requires the Secretary to “first consider the minimum interest in real property” needed to support a water resources projects when acquiring an interest in land or requiring a non-Federal sponsor to do so. The language further requires the Secretary to “first consider a temporary easement or other interest designed to reduce the overall cost” of the project.

While Friends of the Mississippi River recognizes the value of reducing overall project costs, it is essential that the implementing guidance for Section 1115 ensure that legal requirements and fundamental project goals and objectives drive the determination of “the minimum interest in real property” needed to support a water resources project. Of particular concern is ensuring the

appropriate assessment of the “minimum interest in real property” needed for mitigation and for lands and waters targeted for restoration or natural infrastructure.

Mitigation: Lands required for mitigation (and mitigation buffers) of permanent or long-term adverse impacts from water resources projects require use of a permanent interest in real property. This is required by: (i) the fundamental objective of mitigation; (ii) the significant difficulties inherent in producing ecologically successful restoration that replaces all lost functions and values and adequately accounts for the time it takes for the establishment of mature wetlands and wetland forests; and (iii) the mitigation standards applicable to Corps civil works projects. Among many other requirements, the Corps’ civil works mitigation must comply with “the mitigation standards and policies established pursuant to the regulatory programs administered by the Secretary.” 33 USC § 2283(d). These regulatory program standards require the long-term protection of mitigation lands and the permanent protection of “preservation sites.”¹

Restoration and Natural Infrastructure: Lands targeted for restoration or use as natural infrastructure also require use of a permanent interest in real property (e.g., through ownership in fee simple or a permanent easement) to ensure the ecological sustainability of the promised project benefits and the wise use of taxpayer dollars. Benefits achieved as a result of restoration projects and/or use of natural infrastructure approaches will be lost if the restored areas are developed, adversely modified, or converted to other uses. Such changes would be allowed upon expiration of a temporary easement or other temporary interest in lands obtained for these purposes, leading to the inappropriate termination of vital project benefits and to the significant waste of taxpayer dollars.

Exceptions to requiring a permanent interest in real property for restoration and natural infrastructure projects should be extremely limited and should require documentation that a temporary interest will ensure the long-term ecological sustainability of the restoration or natural infrastructure measure. For example, an exception to a permanent interest may be appropriate for areas that are currently an integral component of a restoration or natural infrastructure project but are likely to be inundated by sea level rise in the coming decades.

Friends of the Mississippi River urges that the implementation guidance for this section:

- (1) Explicitly state that temporary easements or other temporary interests in land are not appropriate for mitigation, and may not be used to obtain lands for any form of civil works mitigation (e.g., Corps-implemented preservation, restoration, or enhancement; mitigation banks; or in lieu fee programs).

¹ E.g., 33 CFR 332 (mitigation site protection instruments must include a “description of the legal arrangements and instrument, including site ownership, that will be used to ensure the long-term protection of the compensatory mitigation project site” and preservation mitigation requires “permanent” protection of the preservation site); 33 CFR 332.4(c) (requiring mitigation plans to include a site protection instrument that provides a “description of the legal arrangements and instrument, including site ownership, that will be used to ensure the long-term protection of the compensatory mitigation project”); 33 CFR 332.7 (describing the requirements for ensuring long-term protection, management, and sustainability of mitigation sites, including a requirement that the “permit conditions or instrument must identify the party responsible for ownership and all long-term management of the compensatory mitigation project”); 33 CFR 332.8 (requiring that each prospectus for a mitigation bank or in lieu fee program include information on “proposed ownership arrangements and long-term management strategy for the mitigation bank or in-lieu fee project sites”).

- (1) Explicitly state that temporary easements or other temporary interests in land are not appropriate for, and may not be used to obtain, lands and waters that will be counted as providing restoration benefits or that will be utilized for natural infrastructure except in the most limited of circumstances. The implementing guidance should further clarify that exceptions to requiring a permanent interest in real property for restoration and natural infrastructure projects will require documentation that a temporary interest will ensure the long-term ecological sustainability of the restoration or natural infrastructure measure. For example, a less than permanent interest in real property may be appropriate for areas that are currently an integral component of a restoration or natural infrastructure project but which are likely to be inundated by sea level rise in the coming decades.

Section 1149. Inclusion of Alternative Measure for Aquatic Ecosystem Restoration:

Section 1149(c) states that feasibility studies for flood risk management or hurricane and storm damage risk reduction projects “shall consider” use of natural infrastructure alternatives, alone or in combination with traditional infrastructure, “if those alternatives are practicable.”

Friends of the Mississippi River strongly supports increased use of natural infrastructure solutions — actions that protect and restore healthy rivers, floodplains, wetlands, and shorelines — to reduce flood and storm damages. Natural infrastructure solutions have a proven track record of reducing flood and storm damages for communities while protecting the environment; avoiding catastrophic levee, floodwall, and dam failures; and reducing overall project costs. Natural infrastructure measures can also be used in combination with non-structural and structural measures to increase levels of protection and improve environmental health. The implementing guidance should provide meaningful direction and supporting information to assist Corps planners in developing effective and practicable natural infrastructure solutions.

Friends of the Mississippi River urges that the implementation guidance for this section:

- (1) Describe the types of activities that qualify as natural infrastructure alternatives for purposes of section 1149 to include at least the following:

For the purposes of section 1149, natural infrastructure is the strategic use, restoration, or management of natural lands and waters to conserve and restore ecosystem functions and/or reduce flood or storm damages. Natural infrastructure alternatives seek to use, enhance, facilitate, protect or restore naturally occurring hydrologic, geomorphic, biological, chemical and ecological functions and processes of streams, rivers, floodplains, wetlands, or shorelines. Natural infrastructure includes natural and nature-based features, as defined by 33 U.S.C. 2289a. Actions that qualify for use in a natural infrastructure alternative include, but are not limited to: (i) acquisition of land or easements, including flooding easements; (ii) removal of structures such as dams, levees, and culverts to restore natural hydrology, form, function, or ecological processes; (iii) modification of structures such as dams and levees, including through sediment diversions or levee setbacks, to restore natural hydrology, form, function, or ecological processes; (iv) reoperation of dams and reservoirs to restore or better mimic natural hydrology and flow patterns (v) restoration efforts designed to reestablish natural hydrology, form, function, or processes of rivers, streams, floodplains, wetlands, or

shorelines; (vi) creation or restoration of living shorelines; or (vii) removal of nonnative vegetation or reintroduction of native vegetation.

- (2) Clarify that natural infrastructure measures can work effectively in combination with a wide range of other measures, including: (i) non-structural 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; (ii) changes to the operation of existing water resources projects through updates to water control manuals and navigation operations and maintenance plans; and (iii) traditional engineered infrastructure.
- (3) Provide a definition for the term “practicable” that is consistent with existing regulatory definitions. Both Corps and Environmental Protection Agency regulations define “practicable” as “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” 33 CFR 335.7; 40 CFR 23.10(a).
- (4) Clarify that the directive to “consider” natural infrastructure requires an intensive and careful examination of such approaches. To achieve this objective, the guidance should further clarify that:
 - a. Natural infrastructure solutions are presumed to be available unless it is clearly demonstrated in writing that such solutions cannot provide, or significantly contribute to, an appropriate level of protection.
 - b. A natural infrastructure solution may not be rejected as being impracticable simply because it may not be able to address all identified problems. In such cases, natural infrastructure must be considered in combination with non-structural approaches, operational changes, and/or traditional engineered structures.
 - c. Absent a clear demonstration that no practicable natural infrastructure solutions are available, the final array of alternatives must include at least one natural infrastructure alternative that receives a full and detailed environmental and economic analysis.
- (5) Clarify that the section 1149(c) mandates must be followed 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.
- (6) Clarify that, as with all other types of alternatives, the Corps shall document the benefits and costs of natural infrastructure alternatives in a manner that allows meaningful comparison with the benefits and costs of traditional infrastructure. The guidance should direct that the assessment of benefits of both natural infrastructure and traditional infrastructure alternatives shall: (i) account for, including where appropriate by assessing the value of ecosystem services, flood and storm attenuation benefits across alternative types by evaluating and valuing such things as coastal or riverine erosion prevention, wave attenuation, wind reduction, storm surge attenuation, floodwater storage, and water

storage and absorption; (ii) ensure full assessment of benefits by evaluating and valuing benefits from natural infrastructure that go beyond flood and storm damage reduction, including such things as fish and wildlife habitat, biological regulation, groundwater recharge, nutrient regulation, cultural and social justice benefits; and (iii) in assessing the benefits of projects utilizing a combination of natural infrastructure and traditional infrastructure solutions, include an evaluation and valuation of: additional levels of storm or flood protection, increased survivability of structures, and reduced maintenance costs resulting from the natural infrastructure component. The guidance should direct that the assessment of project costs of both natural infrastructure and traditional infrastructure alternatives shall include a line item that accounts for the costs of any lost or forgone ecosystem services, and a line item that accounts for the costs of any needed mitigation.

- (7) Direct planners to review current science and economic literature documenting the efficacy and cost effectiveness of natural infrastructure in reducing flood and storm damages, and provide key citations to recent literature.

Finally, as you work to implement Section 1149, we recommend that you share examples of successful natural infrastructure measures with Corps planners. Natural infrastructure measures have been produced demonstrable flood and storm damage reduction benefits across the country. For example:

- 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%.²
- 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.
- 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.³ The easement purchase effort began after the historic 1993 floods.
- Restoration of wetlands and lands adjacent to 19 stream corridors in Staten Island, New York “successfully removed the scourge of regular flooding from southeastern Staten Island, while saving the City \$300 million in costs of constructing storm water sewers.”⁴ Approximately 400 acres of freshwater wetland and riparian stream habitat has been restored along 11 miles of stream corridors that collectively drain one third of Staten Island’s land area.
- The city of Tulsa Oklahoma responded to the devastating flood of 1984 by developing and implementing a plan that restored open space where floodwater can safely overflow, created permanent lakes, and relocated buildings from the Mingo Creek floodplain. Local property owners and businesses have not suffered major property

² 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>).

³ Natural Resources Conservation Service, Restoring America’s Wetlands (available at https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/16/nrcs143_006638.pdf).

⁴ Cooper Union, Institute for Sustainable Design, *The Staten Island Bluebelt: A Study In Sustainable Water Management* (<http://cooper.edu/isd/news/watch/statenisland>). These effort was started in 1990.

losses due to flooding since the project was completed, and Tulsa’s residents have received up to a 35% discount on their flood insurance rates.⁵

- 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.⁶

Section 1152. Study of Water Resources Development Projects by Non-Federal Interests:

Section 1152(c) requires the Secretary to fully evaluate, and submit a written report to Congress on, a federally authorized water resources study prepared by a non-Federal sponsor within 180 days of receipt of that study.⁷ The written report to Congress must describe: (i) whether “the study, and the process under which the study was developed, each comply with Federal laws and regulations applicable to feasibility studies of water resources development projects”⁸; (ii) whether the project is feasible; (iii) any recommendations regarding the plan or design of the project; and (iv) any conditions the Secretary may require for construction. Section 1152(c) also directs the Secretary to provide technical assistance to the non-Federal sponsor on the feasibility study if the non-Federal sponsor pays all associated costs; and requires the Secretary to ensure that the use of such funds “will not affect the impartial decisionmaking of the Secretary, either substantively or procedurally.”

While Friends of the Mississippi River appreciates the important benefits that can be achieved through the Section 1152 non-Federal interest study process, those benefits can only be realized if the studies carried out by non-Federal sponsors comply fully with the substantive and procedural legal and technical requirements applicable to water resources studies carried out by the Secretary. Such compliance is essential for protecting the environment, public health and safety, federal taxpayers, and the public’s ability to provide meaningful input into projects that can have a profound impact on their lives and livelihoods. Friends of the Mississippi River’s experience with studies carried out by some non-Federal sponsors strongly supports our call for explicit guidance on these requirements.

The inclusion of detailed guidance on a non-Federal sponsor’s project study obligations will facilitate and expedite the development of legally-compliant studies and prevent unnecessary delays resulting from such things as the need to undertake additional studies, obtain additional approvals, or re-issue studies for public comment due to a lack of clarity regarding substantive and procedural legal requirements. The implementing guidance should provide clear direction to non-Federal sponsors on their project study obligations, and adopt procedures to ensure that the Secretary can make a meaningful and impartial assessment of the study in the limited time provided by Section 1152.⁹

⁵ Naturally Resilient Communities Case Study, available at <http://nrcsolutions.org/tulsa-oklahoma/>

⁶ K.B. Watson, et al, *Quantifying flood mitigation services: The economic value of Otter Creek wetlands and floodplains to Middlebury, VT*, Ecological Economics 130 (2016) 16-24, <https://doi.org/10.1016/j.ecolecon.2016.05.015>.

⁷ Section 1152 amends 33 USC 2231.

⁸ 33 U.S.C. § 2231(b).

⁹ The existing guidance documents regarding preparation of studies by non-Federal sponsors do not achieve these vital objectives.

Friends of the Mississippi River urges that the implementation guidance for this section:

- (1) Explicitly confirm 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) Provide a detailed listing of the applicable laws that must be followed, and highlight key substantive and procedural requirements, including but not limited to the critical importance of complying with:
 - a. The National Environmental Policy Act (NEPA), including its requirement to meaningfully engage the public. To help facilitate effective public engagement in the NEPA process, as required by law, the implementing guidance should:
 - i. Establish a process for ensuring the broad dissemination of public comment opportunities, including through publication in the Federal Register with the assistance of the Corps. Friends of the Mississippi River strongly recommends providing 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. Formal public comment periods are required on the scope of the environmental review and on draft and final environmental impact statements. Formal public comment periods should also be required on draft and final environmental assessments.
 - ii. Clarify that a public comment period on an incomplete environmental impact statement or draft environmental assessment will not satisfy NEPA, and will preclude a finding by the Secretary that the study is in compliance with the law under 33 U.S.C. § 2231(b). All analyses required under NEPA, including the documentation outlined throughout these comments on Section 1152, must be included in a draft environmental impact statement or draft environmental assessment released for public comment.¹⁰ 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.”¹¹
 - b. The Clean Water Act, including the substantive and analytical requirements of Clean Water Act Section 404 and the 404(b)(1) Guidelines,¹² and requirement to obtain any needed Clean Water Act Section 401 State Water Quality Certifications. The implementing guidance should require inclusion of at least a draft 404(b)(1) Guidelines analysis with the draft environmental impact statement or draft environmental assessment to facilitate meaningful public comment.
 - c. The Federal Endangered Species Act. The implementing guidance should further clarify that Endangered Species Act-required documents are to be provided to the

¹⁰ **A recently released draft environmental impact statement prepared by the non-Federal sponsor under Section 211 failed to include critically and legally required information, including:**

¹¹ *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 708 (10th Cir. 2009).

¹² 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.

public along with the draft environmental impact statement or draft environmental assessment to facilitate meaningful public comment.

- d. The Fish and Wildlife Coordination Act. The implementing guidance should further 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 or draft environmental assessment to facilitate meaningful public comment.
 - e. The full suite of mitigation requirements applicable to Corps civil works projects, 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. 33 U.S.C § 2283.
 - f. The Independent External Peer Review requirements, including the requirements regarding public notification; and the Corps’ internal peer review requirements. 33 U.S.C. § 2343. The implementing guidance should further 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 or draft environmental assessment to facilitate meaningful public comment.
 - g. The requirement to consider natural infrastructure alternatives, alone or in combination with traditional infrastructure, “if those alternatives are practicable” in each feasibility study for flood risk management or hurricane and storm damage risk reduction projects. WRDA 2018, Section 1149(c).
 - h. The requirement to consider nonstructural alternatives when planning flood damage reduction projects. 33 U.S.C. § 701b-11.
 - i. The National Water Resources Planning Policy requirement that all federal water resources projects are to “protect[]and restor[e] the functions of natural systems and mitigat[e] any unavoidable damage to natural systems.” 42 U.S.C. 1962-3.
- (3) Clarify that non-Federal interests must provide planning and design data on the Internet and upon a request from members of the public. 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.*
- (4) Strongly encourage the non-Federal sponsor to undertake early coordination with the Corps, the U.S. Fish and Wildlife Service and/or the National Oceanic and Atmospheric Administration as applicable, the Environmental Protection Agency, and state resource agencies.
- (5) 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 implementing 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 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 U.S.C. § 2343, and whether the statutory and other requirements for such reviews are being complied with;
 - d. Whether the draft Environmental Impact Statement or draft Environmental Assessment 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.
- (6) Clarify that the Corps will take 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. ER 1105-2-100 provides that:

“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.”¹³

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

¹³ 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)

- (8) 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.

Section 1153. Construction of Water Resources Development Projects by Non-Federal Interests:

Section 1153 provides, among other things, that a non-Federal interest is not required “to obtain any Federal permits or approvals that would not be required if the Secretary carried out the project or separable element” for projects carried out under Section 1153 provided the non-Federal interest has entered into a written agreement with the Secretary that satisfies the requirements established by Section 1153. However, the directives in Section 1153 are subject to two important exemptions: (1) the non-Federal interest must obtain Federal permits or approvals where “significant new circumstances or information relevant to environmental concerns or compliance have arisen since development of the project recommendation;” and (2) in all cases, the non-Federal interest is “required to obtain a certification from a State under Federal law to carry out the project,” if such a certification would otherwise be required.

Given the complex nature of Section 1153, Friends of the Mississippi River urges that the implementing guidance clearly identify the applicable permits, approvals, and certifications subject to this Section. The implementing guidance should also provide direction regarding the “legal and technical requirements” that must be complied with under the Section 1153 written agreement, and the legal implications of a determination that “significant new circumstances or information relevant to environmental concerns or compliance have arisen since development of the project recommendation.”

Friends of the Mississippi River urges that the implementation guidance for this section:

- (1) Clearly describe the types of Federal permits and approvals that must still be obtained by the non-Federal sponsor because they would be required for a project constructed by the Secretary. These include at least the following:
 - a. Permits or approvals required pursuant to the Federal Endangered Species Act, including Biological Opinions and Incidental Take Permits.
 - b. Permits or approvals required pursuant to the Marine Mammal Protection Act, including Incidental Take Permits.
 - c. Approvals required by a coastal state under the Coastal Zone Management Act, including state concurrence with a Consistency Determination.
 - d. Permits or approvals required by Clean Water Act Sections 401, 402, and a state dredge and fill permit in those states with delegated Clean Water Act 404 authority (see also, recommendation (3) below).

- (2) Clarify that the “written agreement” requiring a non-Federal interest to “comply with the same legal and technical requirements that would apply if the project or separable element were carried out by the Secretary,” requires full compliance with an extensive array of requirements including, but not limited to:

- a. Clean Water Act Section 404 and the 404(b)(1) Guidelines. Corps civil works projects must comply with the substantive and analytical requirements of § 404, although the Corps does not issue itself an actual permit. 40 C.F.R. § 230.2; 33 C.F.R. § 336.1.
- b. The full suite of mitigation requirements applicable to Corps civil works projects, 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. 33 U.S.C § 2283.
- c. The Independent External Peer Review requirements established by 33 U.S.C. § 2343, including the public notification requirements.
- d. The National Water Resources Planning Policy requirement that all federal water resources projects are to “protect[]and restor[e] the functions of natural systems and mitigat[e] any unavoidable damage to natural systems.” 42 U.S.C. 1962-3.

Additional requirements are described in our comments on Section 1152, above.

- (3) Clarify that the new “Certifications” provision, which will be codified at 33 U.S.C. § 2232(b)(3), requires a non-Federal sponsor to obtain a state Clean Water Act Section 401 Water Quality Certification, and a state dredge and fill permit in those states with delegated Clean Water Act 404 authority. As noted in recommendation (1) above, the non-Federal sponsor is also required to obtain a state concurrence with a Coastal Zone Management Act Consistency Determination.
- (4) Clarify that a supplemental environmental review must be prepared if “significant new circumstances or information relevant to environmental concerns or compliance have arisen since development of the project recommendation,” as referred to in Section 1153. Agencies are required to prepare a supplement to an environmental impact statement if “the agency makes 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.”¹⁴ An environmental assessment must also be supplemented if these standards are met.¹⁵

Section 1168. Disposition of Projects:

Section 1168 directs the Corps to carry out disposition studies in a transparent process, including by providing opportunities for public comment and publishing final studies; requires the Secretary to “consider modifications that would improve the overall quality of the environment in the public interest, including removal of the project or a separable element of a project”; and authorizes the Secretary to use existing authorities to pursue the removal of infrastructure recommended for removal in a disposition study in partnership with others.

¹⁴ 40 C.F.R. § 1502.9(c); see *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.”)

¹⁵ E.g., *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1152 (9th Cir. 1998).

Friends of the Mississippi River strongly encourages the disposition and removal of Corps infrastructure projects that no longer serve a Federal interest as such removal creates important opportunities for highly effective, self-sustaining ecosystem restoration that will benefit people and wildlife. The implementing guidance should update and revise the Interim Guidance on the Conduct of Disposition Studies¹⁶ issued by the Corps in 2016 (the “Disposition Study Interim Guidance”) to account for the important changes established by Section 1168. The implementation guidance should also clarify the need to prepare an environmental impact statement or environmental assessment as part of the Disposition Study process, as required by the National Environmental Policy Act.

Friends of the Mississippi River urges that the implementation guidance for this section:

- (1) Clarify that both Draft and Final disposition studies are subject to formal public notice and comment periods to ensure full transparency and facilitate public input into disposition studies which are funded 100% through federal taxpayer dollars.
- (2) Direct the posting of Draft and Final disposition studies, and related public comments, on the Corps’ website within 10 days of completion. We recommend that all disposition studies be accessible through a single webpage to increase transparency, and to facilitate the public’s ability to locate disposition studies and track and engage in the disposition study process.
- (3) Further increase transparency during the disposition study process by:
 - a. Making the “preliminary opinion regarding the marketability of the project” available to the public to inform the comment period on Draft and Final Disposition Studies. This preliminary opinion is required by Section 6 of the Disposition Study Interim Guidance which states that “Real Estate will prepare a preliminary opinion regarding the marketability of the project, in total or as separate segments to other federal agencies, state and local authorities, or private entities.”
 - b. Making information prepared pursuant to the “Decision Meeting” and “Milestone”¹⁷ requirements of the Disposition Study Interim Guidance available to the public to inform the public comment period on the Draft and Final Disposition Studies. Some districts appear to be relying on data and studies generated by single user groups during this initial decision-making stage in the disposition study process, which could inadvertently skew the decision-making process. The public should have access to this, and all other information used by the Corps, to ensure transparency and provide opportunities for meaningful public comment.
 - c. Provide an opportunity for public comment on any determination that a disposition study will not be pursued for a particular project.
- (4) Explicitly state that disposition studies “shall consider modifications that would improve the overall quality of the environment in the public interest, including removal of the project or separable element of a project” as required by Section 1168. The Disposition Study Interim Guidance should also be amended to remove any statements to the contrary.

¹⁶ USACE, Interim Guidance on the Conduct of Disposition Studies, August 22, 2016 (available at https://planning.ercd.dren.mil/toolbox/library/MemosandLetters/2016_Disposition_Memo.pdf).

¹⁷ Disposition Study Interim Guidance, Sections 7(a) and (b).

- (5) Explicitly state that separate authorization is no longer required to pursue removal of a project or separable element of a project where, upon completion of a disposition study, the Secretary determines that the project or separable element is no longer in the Federal interest and recommends removal. Under those circumstances “the Secretary is authorized, using existing authorities, to pursue removal of the project or separable element of a project in partnership with other Federal agencies and non-Federal entities with appropriate capabilities to undertake infrastructure removal.” WRDA 2018 § 1168. The Disposition Study Interim Guidance should also be amended to remove any statements to the contrary.
- (6) Amend the definition of “Disposition Studies” in Section 2 of the Disposition Study Interim Guidance to properly identify the types of projects subject to Section 1168 and the Disposition Study process. Disposition studies are authorized by Sec. 216 of the Flood Control Act of 1970, which authorizes the Secretary “to review the operation of projects *the construction of which has been completed and which were constructed by* the Corps of Engineers.”¹⁸ However, the 2016 Disposition Study Interim Guidance applies to a much smaller array of projects due to its inappropriate Disposition Study definition which restricts disposition studies to evaluating “a water resources development project *operated and maintained* by the Corps of Engineers.”¹⁹ Section 2(b) of the Disposition Study Interim Guidance should be revised to clarify that disposition studies can be carried out for any project constructed by the Corps, not just for those projects that the Corps continues to be operate and maintain.
- (7) Delete Section 3 of the Disposition Study Interim Guidance, or substantially revise Section 3 to conform to existing law which explicitly states that in carrying out a disposition study, “the Secretary shall consider modifications that would improve the overall quality of the environment in the public interest, including removal of the project or separable element of a project.” Section 3 of the Interim Guidance does not comply with Section 1168 because it states that a separate feasibility study or major rehabilitation study is required to investigate “opportunities . . . to modify a project to serve its authorized or a new water resources development purpose, such as ecosystem restoration” and that such studies “will not be conducted using disposition study funding.” Section 3 of the Interim Guidance also appears to be in conflict with Section 216 of the 1970 Flood Control Act which allows the Corps to use the disposition study process to report to Congress on the “advisability of modifying the structures or their operation, and for improving the quality of the environment in the overall public interest.”²⁰
- (8) Amend Section 6 of the Disposition Study Interim Guidance to clarify that Real Estate recommendations must take into account project modifications that would improve the overall quality of the environment in making recommendations. The current Interim

¹⁸ 33 USC 549a (emphasis added).

¹⁹ Disposition Study Interim Guidance § 2(b) (emphasis added) (“A specific type of study conducted under the authority of Section 216 of the Flood Control Act of 1970 (Review of Completed Projects) with the intent to determine whether a water resources development project operated and maintained by the Corps of Engineers should be deauthorized, and if the associated real property and Government-owned improvements should undergo disposal.”)

²⁰ 33 USC 549a

Guidance requires only that Real Estate make a recommendation regarding disposal based on “known stakeholder interests, local opportunities and the capability of potential end users.”²¹

- (9) Amend Section 8(a)(iii) of the Disposition Study Interim Guidance to require that disposition studies consider a third category of alternatives that evaluate and assess modifications of the project to improve the overall environment, including infrastructure removal, as required by Section 1168(a).²² The Implementing Guidance should provide additional guidance on developing this alternative by, at a minimum, requiring the Corps to:
- a. Consider its ecosystem restoration authorities, and determine whether the project could be modified or removed to improve the overall quality of the environment under those existing ecosystem restoration authorities.
 - b. Determine whether there are federal, state, tribal, local governmental entities or private entities with an interest in acquiring the infrastructure for modification or removal purposes to improve the overall quality of the environment.
 - c. Determine whether there are non-federal sponsors interested in modifying or removing the infrastructure to improve the overall quality of the environment prior to disposal (*i.e.*, allowing the Corps to maintain ownership of the infrastructure to address liability issues while the non-federal sponsor finances modification or removal).

Clarify the need to prepare an environmental impact statement or environmental assessment as part of the Disposition Study process, as required by the National Environmental Policy Act. Disposition and removal of Corps-owned infrastructure is a major federal action significantly affecting the quality of the human environment. As a result, NEPA review is both required and essential for ensuring a full examination of potential impacts and a full range of alternatives. For example, removing a dam can be the fastest, most effective strategy for restoring a river reach and redressing some of the typically significant adverse impacts caused by the dam’s construction and operation. However, there are also potential negative environmental impacts from dam removal (for example, release of toxic sediments) that must be examined and considered in developing, analyzing and sele

²¹ Disposition Study Interim Guidance § 6.

²² The Disposition Study Interim Guidance currently requires consideration of two categories of alternatives, “No Action” and “Deauthorize the project and dispose of the associated real property and improvements in accordance with the appropriately identified authority unless a specific disposal authority is granted based on site-specific conditions, including removal of the project improvements.” Disposition Study Interim Guidance §8(iii)(1) and (2).